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From Words to Deeds: A Research Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms

Fuerzas Armadas Revolucionarias de Colombia–Ejército del
Pueblo (Revolutionary Armed Forces of Colombia –
People's Army, FARC-EP)

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LIST OF ACRONYMS AND ABBREVIATIONS

AP II	1977 Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 8 June 1977
APMs	Anti-personnel mines
ANSA	Armed non-state actor
ELN	Ejército de Liberación Nacional
ERW	Explosive remnants of war
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo
GCs	Geneva Conventions, 12 August 1949
HRW	Human Rights Watch
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
IED	Improvised explosive device
IHL	International humanitarian law
IHRL	International human rights law
NGO	Non-governmental organization
NIAC	Non-international armed conflict
OHCHR	Office of the United Nations High Commissioner for Human Rights
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UXO	Unexploded ordnance

EXECUTIVE SUMMARY

This case study has been conducted as part of the research project on armed non-state actors' (ANSAs) practice and interpretation of international humanitarian law (IHL), led by the Geneva Academy of IHL and Human Rights and Geneva Call, in collaboration with the American University in Cairo and the Norwegian Refugee Council (NRC). From a legal perspective, while ANSAs are bound by IHL, how they actually perceive, understand and act upon their obligations has remained insufficiently explored. Through a comparative analysis of selected norms, the research project aims to advance understanding of ANSAs' perspectives and behaviour, enhance strategies to promote their compliance with IHL as well as inform future international law-making processes. By assessing the Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo's (FARC-EP) practice and interpretation in relation to a selection of IHL rules, this case study aims to fill this gap. Compiling and analysing the FARC-EP's views enables an understanding of how this ANSA perceived international law, the norms that enjoyed greater acceptance and those that were disputed. This case study responds to several inquiries, notably why the FARC-EP chose to express its views through specific commitments and the references contained therein, and how its internal dynamics and policies evolved throughout the conflict.

Key findings include:

- The FARC-EP's attitudes with respect to IHL norms were influenced by its relations with other parties, including paramilitary ANSAs and the Colombian state. Based on the findings of this case study, two examples serve to justify this: i) The FARC-EP interpreted certain legal notions on the basis of the entity it was fighting against; for instance, when one of its blocs considered as military targets those civilians who would support

paramilitary groups. ii) There is an increasing number of public documents reporting violations by the FARC-EP of specific IHL norms, such as the prohibition of forced displacement, at the time it was actively fighting against both paramilitary groups and governmental forces. It has been said, for instance, that the military pressure on the FARC-EP during the Alvaro Uribe government (2002–2010) led the group to indiscriminately resort to landmines to hinder army advances.

- Although the FARC-EP considered IHL to be an 'elitist' legal regime, developed by states and only addressing their own interests, the group modified its attitudes throughout its almost 50 years of existence, reflecting the rise and fall in its level of acceptance of this legal regime at specific moments. Two key moments in which the FARC-EP openly addressed IHL-related issues were identified: i) when in discussions with humanitarian organizations on the ground; and ii) when the FARC-EP attempted to be recognized as a 'belligerent' movement', for which the international commission even prepared a written document toward that goal. From these scenarios, this case study concludes that international law, and in particular IHL, was a tool to be used by the FARC-EP when looking for political recognition.
- A further point relates to the content of the FARC-EP's internal regulations when compared to international legal standards and those applicable to the territorial State. An example of this can be observed in the group's prohibition of using and recruiting children below the age of 15, which was adopted in 1982. The 1977 Additional Protocol II, which contains a similar provision, only entered into force in Colombia in 1995.

1. INTRODUCTION

This case study has been conducted as part of the research project on armed non-state actors' (ANSAs') practice and interpretation of international humanitarian law (IHL),¹ led by the Geneva Academy of IHL and Human Rights and Geneva Call, in collaboration with the University of Cairo and the Norwegian Refugee Council (NRC).²

This research project builds on three interrelated dynamics. First, most armed conflicts today are non-international in nature, involving ANSAs fighting government forces or other armed groups.³ In many countries, ANSAs play prominent roles and have a direct impact on the civilian populations, especially in territories

under their control. In this context, the international community has called for a more sustained engagement with ANSAs to ensure the delivery of humanitarian aid and to enhance IHL compliance.⁴ Second, from a legal perspective, though it is undisputed that ANSAs are bound by IHL, how they actually view, interpret or implement their international obligations has remained insufficiently explored by legal scholars.⁵ While a number of studies have analysed states' practice, notably the 2005 study by the International Committee of the Red Cross (ICRC) on customary IHL,⁶ a comprehensive analysis of existing humanitarian norms from the perspective of ANSAs has yet to be made. Only then, one will 'know how the existing rules and possible future developments of IHL...would change if they were taking the perspective of non-State armed groups into account'.⁷ Finally,

¹ The research project focuses on international humanitarian law (IHL) rules. Nevertheless, certain rules related to human rights, such as gender equality or the 18-years age limit for the recruitment and participation of children in hostilities were included in the interviews. In addition, armed non-state actors' (ANSAs') policies and regulations on human rights are mentioned and included in the study. Indeed, even if the matter of human rights obligations of ANSAs is controversial, ANSAs themselves often refer to human rights in their policies and regulations. This is a good indication of what some ANSAs feel bound by and thus deserves to be considered in the analysis, notably because it can be indicative of what could be included in future law-making processes.

² For further information on the project, including a definition of ANSA, see A. Bellal, P. Bongard and E. Heffes, *From Words to Deeds: A Research of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms*, Research Brief, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), December 2019, <https://www.geneva-academy.ch/joomlatools-files/docman-files/From%20Words%20to%20Deeds%20A%20Research%20of%20Armed%20Non-State%20Actors%E2%80%99%20Practice%20and%20Inter.pdf> (last accessed 1 Jan 2021).

³ See A. Bellal (ed), *The War Report: Armed Conflicts in 2018*, Geneva Academy, 2019, p.19, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf> (last accessed 29 December 2020); International Committee of the Red Cross (ICRC), *The Roots of Restraint in War*, 2018, pp 13–14.

⁴ United Nations Security Council (UNSC), Protection of Civilians in Armed Conflict: Report of the Secretary-General, UN doc S/2019/373, 7 May 2019, §66 (affirming that '[e]nhancing respect for the law requires changing the behaviour and improving the practices of non-State armed groups. Key to this is principled and sustained engagement by humanitarian and other relevant actors that is, moreover, strategic and based on a thorough analysis of the group(s) concerned').

⁵ Several authors have referred to this knowledge gap. See, among others, M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing, 2019; H. Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, 2015; D. Petrasek, *Ends & Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, 2000.

⁶ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, 2005. See also the ICRC Customary IHL Database (ICRC CIHL Database), <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (last accessed 29 December 2020). It should be noted that the 2005 ICRC study does not focus on issues of compliance with IHL, but on the identification of customary IHL norms. Of course, an argument can be made that the practice and *opinio juris* needed for the latter serves as an indicator to measure the level of acceptance of, and respect for, the applicable legal framework. A study on the correlation between both is beyond the scope of this case study.

⁷ M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International

the state-centric approach to ANSAs' international obligations may explain to some extent their lack of ownership of, and compliance with, international law. Indeed, there is an increasing sense that ANSAs' compliance with international law is likely to improve if they are consulted about the development and implementation of the rules that are binding upon them.⁸

Drawing on these premises, the research project aims to address these gaps and increase our knowledge of ANSAs' practice and interpretation of selected international humanitarian norms, anchored notably in IHL.⁹ It focuses on the following main questions:

- Are ANSAs familiar with these norms and how do they understand them?
- Do they agree with their content?
- What factors influence their policy and practice?
- Are there new issues that ANSAs would be willing to regulate in the future?

Through a comparative analysis of ANSAs' views, the research will provide a better sense of how ANSAs perceive IHL, which norms are more accepted or disputed, respected or disregarded, and why. It will also shed light on the causes of violations or, a contrario, the factors that are conducive to compliance or restraint. Altogether, it is expected that the results of the research will advance understanding of ANSAs' perspectives

Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* 1 (2010) 19.

⁸ Ibid; S. Sivakumaran, 'Implementing Humanitarian Norms Through Non-State Armed Groups', in H. Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons From the African Great Lakes Region*, Cambridge University Press, 2015; S Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012.

⁹ The research examines ANSAs' perspectives on the following core norms: i) protection of civilians from attacks; ii) the prohibition of sexual violence and gender discrimination; iii) the prohibition of using and recruiting children in hostilities; iv) protection of education; v) humanitarian access; vi) protection of health care; vii) the prohibition of forced displacement; viii) use of landmines

and behaviour, enhance strategies to promote their compliance with IHL as well as inform future international law-making processes.

Drawing notably on Geneva Call's Their Words database (www.theirwords.org), the research will entail a global analysis of various sources used by ANSAs that reflect their position on international law. Documentary sources include unilateral declarations, public statements, codes of conduct, command orders, penal codes, legislations, decrees, memoranda of understanding, special agreements, as well as peace and ceasefire agreements.¹⁰ The second method of the research will involve an in-depth investigation – in the form of case studies – of the practice and interpretation of IHL by selected ANSAs. The case studies have been selected according to the following criteria: 1) the existence of a situation of armed conflict entailing the application of IHL; 2) diversity in geographical scope and types of ANSA in terms of size, organizational structure, motivations and territorial control; 3) access to a variety of sources (both primary and secondary) to allow the cross-checking of information.

The present study focuses on the case of the *Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo* (Revolutionary Armed Forces of Colombia–People's Army, FARC-EP), which has been involved in various armed conflicts in Colombia since the 1960s. It is organized as follows. Section 2 explains the methodology used for this research. Section 3 includes information about this group, notably its origins, goals and ideology, as well as its organizational structure

and other explosive devices; iv) detention, fair trial and administration of justice; x) the special protection of certain objects, such as cultural property and the environment. The choice of these norms has been dictated by three factors: First, the violation of these norms represents a current challenge identified by various humanitarian actors when dealing with ANSAs. The second factor is related to ANSAs' perceptions of these norms, as some of them represent the most contentious and challenging humanitarian provisions from their perspective. Finally, some of the selected norms may be part of future legal developments.

¹⁰ An analysis of the legal value of each of these sources will be conducted during the project and will be available on the companion website of the research project, www.words2deeds.org.

and support base. The international obligations of the FARC-EP before the conclusion of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (2016 Peace Agreement) with the Government of Colombia in 2016 are addressed in Section 4. Based on the applicable international legal framework, Section 5 deals with the FARC-EP's practice and interpretation of selected IHL norms. This also includes reports by relevant stakeholders, such as international organizations and human rights NGOs. Section 6 offers some conclusions and recommendations.

This case study does not aim to provide a full account of the FARC-EP behaviour during the conflict nor of its humanitarian consequences. Rather, it seeks to provide an insight into its policy on and interpretation of certain IHL rules from a legal perspective. Little substantive research has been conducted on this aspect and it is hoped that this study will make a valuable contribution.

2. METHODOLOGY

The methodology employed for this case study has consisted of two complementary steps. The first entailed the study of the different policy

documents reflecting the FARC-EP's position on various international legal issues, such as its code of conduct, command orders, public communiqués and different agreements concluded with other parties, including the 2016 Peace Agreement concluded with the Colombian Government.¹¹ These documents are important benchmarks against which the movement's policy can be measured. Two specific volumes containing internal exchanges between former FARC-EP members, provided by the group, were useful for this endeavour.¹²

At the time of drafting this case study, the website of the group was active, which allowed the author to analyse numerous sources, including FARC-EP books, reports and statements. Unfortunately, by February 2021 this was no longer the case. These sources are nonetheless referred to in full throughout this text.

In addition, an extensive desk review of relevant literature was undertaken, primarily reports of human rights NGOs, such as Human Rights Watch (HRW), Amnesty International and national organizations,¹³ and of different United Nations bodies and institutions, including the UN Human Rights Commission (now the Human Rights Council) and the UN Secretary-General on conflict-related sexual violence and on children and armed conflict.¹⁴

¹¹ Some of these documents can be found in Geneva Call, 'Their Words: Directory of Non-State Actor Humanitarian Commitments', http://theirwords.org/?title=&country=&ansa=29&document_type=&year=&_keyword_field= (last accessed 1 January 2021).

¹² See Comisión de Historia FARC-EP, *Resistencia de un pueblo en armas: Una parte de los diarios y la correspondencia de Manuel Marulanda*, 2015; Comisión de Historia FARC-EP, *Resistencia de un pueblo en armas, tomo 2: Insurgencia beligerante, 1980–1997*, 2017. A list of books published by the FARC-EP was also of particular importance. These were available on the FARC-EP website, which is no longer available at the time of this case study's publication.

¹³ See, among others, G. Sanchez (ed), *Una sociedad secuestrada*, Centro Nacional de Memoria Histórica, 2013; Human Rights Watch (HRW), 'Colombia: Letter to Rebel Leader Demands Release of Kidnapped Political Figures', 14 April 2002, <https://www.hrw.org/legacy/press/2002/04/farc-0415-ltr.htm> (last accessed 1 January 2021); HRW, 'Colombia: Rebel Abuses Worsening', 9 July 2001,

<https://www.hrw.org/news/2001/07/09/colombia-rebel-abuses-worsening> (last accessed 1 January 2021); HRW, 'You'll Learn Not To Cry: Child Combatants in Colombia', 2003, <https://www.hrw.org/reports/2003/colombia0903/colombia0903.pdf> (last accessed 1 January 2021); Amnesty International, 'Leave Us in Peace: Targeting Civilians in Colombia's Internal Armed Conflict', 2008, <https://www.amnesty.org/download/Documents/52000/amr230232008eng.pdf> (last accessed 1 January 2021); Coordinación Colombia–Europa–Estados Unidos, *Situación de derechos humanos y derecho humanitario en Colombia 2013–2017: Informe conjunto de las organizaciones de derechos humanos colombianas para el Examen Periódico Universal de Colombia*, 2017, <https://web.karisma.org.co/wp-content/uploads/2018/04/Informe-de-derechos-humanos-y-derecho-humanitario-en-Colombia-2013-2017.pdf> (last accessed 1 January 2021).

¹⁴ See, for instance, UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia, 2012, UN doc S/2012/171, 21 March 2012; Commission on Human Rights, Report of the United Nations High Commissioner for

The goal of this initial research phase was to map the FARC-EP's documentary sources and to gain a general overview of the norms that this ANSA had agreed or committed to respecting and implementing, as well as those that were most affected and reported to have been violated during the conflict. The analysis was guided by the following questions:

- Why did the FARC-EP choose to express its views through these specific commitments and what references (legal, political, social, religious) are included therein?
- Are there any references to international treaties or specific international rules?
- Why did the FARC-EP change its views with respect to specific rules during the conflict?
- Are there any commitments that go beyond the applicable law?
- Are there any correlations between how the FARC-EP was organized and its goals and the content, wording and references of the commitments made?

This study has also been informed by semi-structured interviews conducted during field visits in July and November/December 2019 with former male and female FARC-EP fighters, including members of the Secretariado del Estado Mayor Central (Secretariat of the Central High Command) and key external sources – local and international humanitarian and human rights organizations and scholars specialized in

the Colombian conflict. Twenty interviews were conducted. While some of these exchanges are explicitly referred to in this case study, others have only informed its content and the reviewed literature by sharing specific reports or relevant materials. The interviewees were selected based on their knowledge of the FARC-EP's attitudes towards IHL. The gender dimension was an essential element that the researchers considered when deciding who to interview. To reduce bias, individual interviews followed a standardized questionnaire. All interviewees were informed of the purpose of the interview and the ways in which the information would be used.

Conducting research of this nature is difficult and there are a number of factors that may have limited or influenced the findings. First, in a conflict that lasted more than 50 years, parties modified their attitudes with respect to specific norms. Generally, armed conflicts are dynamic and ANSAs transform and adapt over time.¹⁵ As one researcher working on the various armed conflicts in Colombia affirms, it is 'evident that the ways in which the FARC relate[d] with the civilian population changed according to social scenarios, the situation of the armed group and the military process' that was being undertaken.¹⁶ An assessment of the FARC-EP's policies with respect to specific rules should take this dynamic into account. For instance, its views on the prohibition of using and recruiting children in hostilities in the 1970s and 1980s differ from those adopted during the peace negotiations that led to the 2016 Peace Agreement. Similar methodological challenges can be found with respect to other rules, notably the way in which the group would administer justice in the territories under its control,

Human Rights on the Human Rights Situation in Colombia, UN doc E/CN.4/2001/15, 8 February 2001; UN General Assembly (UNGA)/UN Security Council (UNSC), Children and Armed Conflict: Report of the Secretary-General, UN doc A/62/609-S/2007/757, 21 December 2007, §114.

¹⁵ Nelson Kasfir, in this regard, affirms that '[i]t is commonplace but seriously misleading to characterize rebel groups as if they were unchanging organizations perpetually committed to a single doctrine or practice. Groups that pursue rebellion for many years frequently experience severe fluctuations in their military fortunes'. N. Kasfir, 'Rebel Governance – Constructing a Field of Inquiry:

Definitions, Scope, Patterns, Order, Causes', in A. Arjona, N. Kasfir and Z. Mampilly (eds), *Rebel Governance in Civil War*, Cambridge University Press, 2015, p 34. For a description of the development of the FARC-EP's structure since the 1980s, see Comisión de Historia FARC-EP, *Resistencia de un pueblo en armas, tomo 2*, supra fn 12, p 12.

¹⁶ M. Aguilera Peña, *Guerrilla y población civil: trayectoria de las FARC 1949–2013*, Centro Nacional de Memoria Histórica, 2014, p 24, <http://www.centrodehistoriahistorica.gov.co/descargas/informes2013/farc/guerrilla-y-poblacion-civil-jun-2016.pdf> (last accessed 1 January 2021).

detention and hostage-taking issues, the use of anti-personnel landmines and how it conducted hostilities.¹⁷ Furthermore, FARC-EP practices may have also varied depending on the region, and local dynamics and relations with communities and other parties, be they ANSAs or the state, may have influenced the group's behaviour and responses.¹⁸ The existence of these variations should be acknowledged. This case study aims nonetheless to provide a general picture of how the FARC-EP interpreted the international rules applicable to them, and the sources and practices mentioned below should therefore be contextualized among the many others that could have existed.

Finally, the responses provided by the former members of the already extinct FARC-EP during the interviews must be situated within the post-conflict scenario. In this context, the interviewees may have addressed some policies and practices more openly than others, considering that certain judicial processes are

still ongoing.¹⁹ In order to overcome these limitations, the researchers have tried to cross-check the statements made with external sources to contextualize them and thus attempt to offer a more nuanced picture of the events on the ground. Geneva Call's network in Colombia provided an essential source of information, access to the former leadership of the FARC-EP and, importantly, the scope to ask sensitive questions.

3. FARC-EP PROFILE

The FARC-EP was an armed opposition movement²⁰ mainly active between 1964–2016 – although some sources date its 'official' origin to 1966²¹ – a period in which it managed to constitute itself as a military and political organization throughout the entire Colombian

¹⁷ The ICRC has explained, for instance, that the FARC-EP only ceased to kidnap 'once peace negotiations had begun'. ICRC, *The Roots of Restraint in War*, supra fn 3, p 41. Similarly, in the context of the 2016 Peace Agreement negotiations, the FARC-EP committed to 'an immediate "exit" for those [children] under 15 and develop[ing] a "road map for an exit for the remaining minors," those between 15 and 18', which was not necessarily the policy the group had during the conflict. N. Casey, 'Colombia and FARC Rebels Reach a Deal to Free Child Soldiers', 15 May, 2016, *The New York Times*, <https://www.nytimes.com/2016/05/16/world/americas/colombia-and-farc-rebels-reach-a-deal-to-free-child-soldiers.html>.

¹⁸ This is particularly relevant when assessing the relevance of those reports included in this case study and produced by external stakeholders. Although they often refer to the FARC-EP's actions as an 'entity' that is not different to its members, some of the reported violations may have been committed in a single region or by a specific commander. When possible, this dynamic is acknowledged in this case study.

¹⁹ Different judicial processes are currently under the sphere of the Special Jurisdiction for Peace. For further information, see Jurisdicción Especial para la Paz (JEP), <https://www.jep.gov.co/Paginas/Inicio.aspx> (last accessed 1 January 2021).

²⁰ For the purpose of this research, 'armed opposition movements' typically aim at contesting the power and

legitimacy of a ruling government of a state. They can also fight for the secession of a region or for the end of an occupational or colonial regime. In this sense, they pursue a political, mostly social-revolutionary or ethno-nationalistic agenda. See U. Schneckener, 'Armed Non-State Actors and the Monopoly of Force', in A. Bailes, U. Schneckener and H. Wulf (eds), *Revisiting the State Monopoly on the Legitimate Use of Force*, Policy Paper no 24, Geneva Centre for the Democratic Control of Armed Forces, 2006, <http://www.wulfherbert.de/DCAFP24Wulf.pdf> (last accessed 1 January 2021).

²¹ This is because although the FARC-EP commemorates as its founding milestone the resistance to the attack against Marquetalia in May 1964, it was formally created between the end of April and beginning of May 1966 during the Second Conference of the Guerrillas of the South Bloc (Bloque Sur), an event that had around 250 delegates in which disciplinary and command regulations were approved. Aguilera Peña, *Guerrilla y población civil*, supra fn 16, p 63. See also Uppsala Conflict Data Program Conflict Encyclopedia (UCDP database), 'FARC', <https://ucdp.uu.se/actor/743> (last accessed 1 January 2021); J. Arenas, *Diario de la resistencia de Marquetalia, Abejón Mono*, 1972, p 105. Here, Arenas affirms that the FARC was actually constituted in 1966. It should be noted that the FARC-EP was originally created as 'FARC', only proclaiming itself as a 'people's army' in 1982 during the Seventh National Guerrilla Conference, when it added the 'EP' for the Spanish 'Ejército del Pueblo'.

territory.²² The group followed a Marxist-Leninist ideology, also displaying a special adaptation to the rural areas of Colombia, which some observers have denominated as a mix of agrarianism, Marxism and 'Bolivarism'.²³ It was born as a peasant guerrilla movement group during 'La Violencia', a period of time in which the two dominant political parties in Colombia – Liberals and Conservatives – fought each other. This led to the creation of several peasant's self-defense groups. The FARC-EP nonetheless changed its goal after a few years, aiming to overthrow the Government of Colombia²⁴ and end the 'US imperialism' as well to achieve extensive socio-economic reform.²⁵ In one of its first communiqués, the FARC-EP explicitly supported the implementation of 'revolutionary agrarian reform' in order to change 'the roots of the social structure of the Colombian countryside, giving the land completely free of charge to the peasants who work it or want to work it'.²⁶ According to the former leader of the group, Pedro Antonio Marín (known as Manuel Marulanda Vélez), the group was created 'with the purpose of fighting for the seizure of power for the people'.²⁷ It was formed with the support of the Partido Comunista Colombiano (Colombian Communist Party),²⁸ which considered it at the time to be its 'armed wing'.²⁹

²² The FARC-EP was not present throughout the entire Colombian territory at the beginning of the conflict. The decision to embark on its territorial expansion was taken later on. At the end of the conflict, the group operated throughout Colombia's 32 departments, except for San Andrés Island in the Caribbean Sea. Traditionally, the areas under the greatest FARC-EP influence were in the south-east of the country, which formed part of the FARC's main political, social and military strongholds.

²³ Corporación Observatorio para la Paz (ed), *Las verdaderas intenciones de las FARC*, Intermedio, 1999, p 166.

²⁴ As a former FARC-EP commander said, 'the FARC wants to govern Colombia and to build a more egalitarian model of society'. 'La situación en Colombia/entrevista: Raúl Reyes, lugarteniente de Tirofijo, el máximo líder guerrillero', *Clarín*, 7 October 1999, https://www.clarin.com/ediciones-antteriores/farc-queremos-gobernar-colombia_0_rkWZGc3e0Kx.html.

²⁵ UCDP database, 'Farc', supra fn 21.

While active, the FARC-EP modified its organizational structure through three stages. First it was constituted as a peasant self-defence movement; then it became a 'mobile guerrilla formation'; and finally, the FARC-EP developed itself as an 'army'.³⁰ During the conflict, the FARC-EP had a centralized hierarchical structure.³¹ At the end, it had a Secretariat comprised of 7 high-rank fighters, a Central Command (Estado Mayor Central) composed of 32 members who exercised authority over a system of 'bloc command structures' (*estado mayor de bloque*), front blocs (*bloques de frente*), fronts, columns, companies, guerrillas and squads. According to one commentator, the FARC-EP's organization, 'headed by its Secretariat, was based on an explicit comparison between the state army and the FARC, in which there is a one-to-one correspondence of ranks. The chain of command operated in army-like fashion',³² in which there was a clear line of command.³³ Internal documents establishing the creation of a military school that would train fighters, as well as different schools on intelligence, explosives, communications, first aid, artillery and weapons' knowledge seem to demonstrate that indeed the FARC-EP had an

²⁶ FARC-EP, Programa agrario de los guerrilleros, <http://cedema.org/ver.php?id=4021> (last accessed 1 January 2021).

²⁷ C. Arango Zuluaga, *FARC: Veinte Años de Marquetalia a La Uribe*, Ediciones Aurora, 1984, p 53.

²⁸ The Partido Comunista had in fact ordered the creation of self-defence militias in November 1949, which would pave the way for the creation of the FARC-EP. D. F. Otero Prada, *Las cifras del conflicto Colombiano*, 2nd edn, INDEPAZ, 2007, p 59.

²⁹ Aguilera Peña, *Guerrilla y población civil*, supra fn 16, p 29.

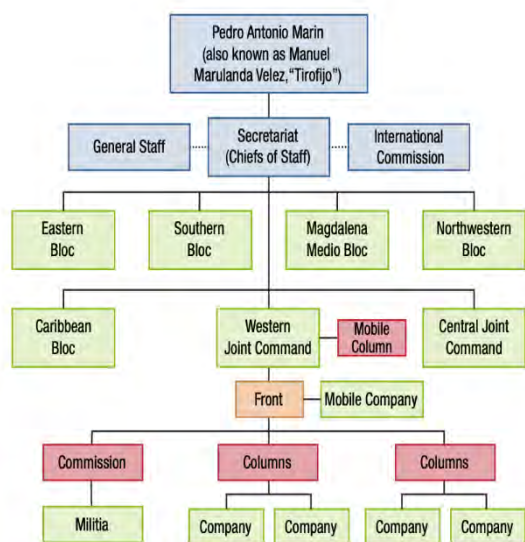
³⁰ F. Gutiérrez-Sanín, 'The FARC's Militaristic Blueprint', 29 *Small Wars & Insurgencies* 4 (2018) 636.

³¹ ICRC, *The Roots of Restraint in War*, supra fn 3, p 38.

³² Gutiérrez-Sanín, 'The FARC's Militaristic Blueprint', supra fn 30, 637.

³³ F. Gutiérrez Sanín, 'Telling the Difference: Guerrillas and Paramilitaries in the Colombian War' 36 *Politics & Society* 1 (2008) 13.

army-like structure.³⁴ The group also had a strong internal discipline, which, it has been argued, contributed to the FARC-EP's successful territorial expansion, 'configuring itself as an army and having significant military power'.³⁵ Similarly, the ICRC has recently observed that by '[h]aving a strict hierarchy, strong disciplinary mechanisms and an immersive socialization process, the FARC-EP was able to curb opportunistic violence at a unit level'.³⁶ Most of its violence, the ICRC added, was ordered from the top.³⁷



Structure of the FARC-EP (1993)

The military and political activities of the group were governed by three documents: i) the Statute (Estatuto),³⁸ which was the most important document regulating the military structure of the group, as well as the rights and duties of its members; ii) the Rules of the Disciplinary Regime, which provided 'the military order to the guerrilla life'; and iii) the Internal Rules of Command, which deal with the daily life of the various units of the FARC-EP. The National Conferences were in charge of updating and ratifying the 'FARC's legislation'.³⁹

Traditionally, the areas where the FARC-EP exerted a greater influence were located in the south-east of the country, which formed part of the FARC-EP's main political, social and military strongholds. Between 1990 and 2002, however, the group established itself as an important challenge to state authority at the national level. During this period, the FARC-EP participated in peace negotiations with the government, notably between 1998 and 2002, when, in addition to its presence in other areas of Colombia, it was granted the control of a territory the size of Switzerland.⁴⁰ This period is often referred to as the 'Caguán period', after San Vicente del Caguán, which was the main town of the area under FARC-EP control and where negotiations took place.⁴¹

³⁴ Comisión de Historia FARC-EP, *Resistencia de un pueblo en armas*, tomo 2, supra fn 12, pp 36–37. For a comparison between an army structure and that of the FARC-EP, see also FARC-EP, *Beligerancia*, p 6, http://theirwords.org/media/transfer/doc/1_co_farc_ep_2000_10-7b8e3621ef7e288f638a8b47107c3937.pdf (last accessed 1 January 2021).

³⁵ M. Aguilera Peña, 'Claves y distorsiones del régimen disciplinario guerrillero', 26 *Análisis Político* 78 (2013) 47.

³⁶ ICRC, *The Roots of Restraint in War*, supra fn 3, p 40.

³⁷ Ibid. A former member of the group also noted that 'the FARC's activities were always organized and disciplined. Obviously with ups and downs, as in all human groups, but everything was programmed, everything was organized and planned'. Interview with former commander of FARC-EP, 4 July 2019.

³⁸ FARC-EP, *Estatuto*.

³⁹ See Comisión de Historia FARC-EP, *Resistencia de un pueblo en armas: Una parte de los diarios y la correspondencia de*

Manuel Marulanda, supra fn 12, p 8. The FARC-EP's website said, nonetheless, that the group was ruled by the conclusions of its national conferences, regulations, statutes and command norms, and by the guidelines of the Strategic Plan approved by the Conference. FARC-EP, 'Conferencia Nacional de Guerrilleros, máxima instancia de las FARC-EP: ¿Qué es la Conferencia Nacional de Guerrilleros?'.
⁴⁰ Amnesty International, *Colombia: San Vicente Del Caguán After the Breakdown of the Peace Talks: A Community Abandoned*, 2002, pp 3–4. <https://www.amnesty.org/download/Documents/112000/amr230982002en.pdf> (last accessed 1 January 2021).

⁴¹ A.-K. Sjöberg, 'Challengers Without Responsibility? Exploring Reasons for Armed Non-State Actor Use and Restraint on the Use of Violence Against Civilians', Phd thesis, Graduate Institute of International and Development Studies, 2010, p 184.

In addition to the more permanent camps, the group had mobile units that operated nationally. It was mostly present in mountainous and jungle areas and sometimes during the conflict in certain urban ones, but its operational capacity was more limited in the latter. During its existence, the FARC-EP took control of areas and regions that based their economy on the cultivation of coca leaves. There, the ANSA created alliances with coca growing peasants, often managing to establish a certain social, economic and political influence, in addition to its military strength.⁴²

In spite of usually being in conflict with the Colombian armed forces, local and regional dynamics occasionally produced more peaceful interactions with governmental actors. As this complex conflict situation shows, the FARC-EP was not a static actor. It had regional and local expressions – although the ultimate power remained with the same organ: the Secretariat. For instance, during the ceasefire under the Belisario Betancur government between 1984 and 1986, a FARC-EP military commander in the south-east of Colombia had meetings with local army commanders to discuss common problems, allegedly in a ‘fraternal’ ambience. It has been reported that similar interactions took between the police and FARC-EP members in the Caguán region.⁴³

With regard to its means and strategies, after years of operating as a traditional military organization that fought for territorial control, the group changed its modus operandi in 2010

due to the killing of high-rank leaders and its exclusion from major cities and economic centres during the Presidency of Alvaro Uribe (2002–2010)⁴⁴ through the so-called ‘Democratic Security Policy’. To adapt, the group decided to go back to its roots of ‘guerrilla warfare’, which included the use of car bombs, landmines and high-impact kidnappings.

In June 2016, the FARC-EP and the Government of Colombia concluded a definitive ceasefire and disarmament agreement, and by September of that same year the peace accord was signed by the parties.⁴⁵ The Peace Agreement was subject to a national referendum in Colombia and was rejected after 50,2% of citizens voted against it with 49,8% voting in favour. This led both parties to sign a revised Peace Agreement in November, which came into force on 1 December 2016. By February 2017, approximately 7,000 former FARC-EP fighters disarmed and returned their weapons to the UN Verification Mission in Colombia,⁴⁶ which declared in September of that same year the end of its mission.⁴⁷

By September 2017, the Fuerza Alternativa Revolucionaria del Común (Common Alternative Revolutionary Force), a political party created by the demobilized commanders, began its activities. It has been led since then by Rodrigo Londoño (known as Timochenko), together with a leadership composed of a collegiate body and 111 members of the National Council of Commons.⁴⁸ According to the 2016 Peace Agreement, the new FARC would be

⁴² Ibid, p 224.

⁴³ Ibid, pp 206–207.

⁴⁴ Corporación Nuevo Arco Iris, ‘Las Farc pierden la guerra en el centro del país pero dan la pelea en la periferia’, 7 March 2013, <http://www.arcoiris.com.co/2013/03/las-farc-pierden-la-guerra-en-el-centro-del-pais-pero-dan-la-pelea-en-la-periferia/> (last accessed 1 January 2021). It has been reported, nonetheless, that the period between 1991 and 2008 includes both the power and territorial expansion of the FARC-EP as well as its progressive political and military weakening, especially after 2004. Aguilera Peña, *Guerrilla y población civil*, supra fn 16, p 173.

⁴⁵ For a study on the discussions that led to the 2016 Peace Agreement, see A. Bermúdez Liévano (ed) *Los debates de La Habana: una mirada desde adentro*, Institute for Integrated

Transitions (Fondo de Capital Humano), 2019, <https://www.ifit-transitions.org/resources/publications/major-publications-briefings/the-colombian-peace-talks-practical-lessons-for-negotiators-worldwide/los-debates-de-la-habana.pdf/view> (last accessed 1 January 2021).

⁴⁶ Coordinación Colombia – Europa – Estados Unidos, *Situación de derechos humanos y derecho humanitario en Colombia 2013–2017*, supra fn 13, p 8.

⁴⁷ Noticias ONU, ‘La ONU da por terminada la dejación de armas de las FARC’, 22 September 2017, <https://news.un.org/es/story/2017/09/1386501> (last accessed 1 January 2021).

⁴⁸ Fuerza Alternativa Revolucionaria del Común – FARC, ‘Estatutos’, Art. 22.

guaranteed five seats in the Cámara de Representantes (lower chamber) and five in the Colombian Senate.⁴⁹

Despite the fact that by 2017 the FARC-EP formally ceased to exist as an armed group, a splinter group led by Gentil Duarte (former commander of the FARC-EP), continues to fight against the government.⁵⁰ Other prominent former FARC-EP's figures, such as Iván Márquez,⁵¹ abandoned the peace process at a later stage in order to also conduct military operations.

BOX 1: INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO THE FARC-EP

Throughout its existence, the FARC-EP was a party to various NIACs, including against the government of Colombia and paramilitary groups.⁵² Its existence as an ANSA ended after the conclusion of the 2016 Peace Agreement, when it was clear that the hostilities had ceased and there was no real risk of their resumption.

Colombia is a party to the four 1949 Geneva Conventions (GCs) and to the 1977 Additional Protocol II (AP II). As such, both the government and the ANSA were bound by Common Article 3 of the GCs. AP II was also applicable after its ratification in 1995 by the government, as the FARC-EP had an established command structure and controlled a considerable amount of the Colombian territory, thus falling within the scope of this treaty. Finally, all parties were also bound by the rules of customary IHL applicable to NIACs and other relevant

applicable treaties.

For more information, see A. Bellal, 'Colombia: Peace Deal with FARC Ends 60 Years of Conflict', *The War Report 2016*, Geneva Academy of IHL and Human Rights, 2017, p 58, <https://www.adh-geneve.ch/joomlatools-files/docman-files/The%20War%20Report%202016.pdf> (last accessed 1 January 2021)

4. FARC-EP IHL POLICY

Historically, the FARC-EP's position was that IHL was created by states for their own good and convenience and that it was not even respected by governmental authorities.⁵³ The ICRC has pointed out, in this respect, that the FARC-EP only partially adopted IHL, preferring 'to end the war rather than humanize it'.⁵⁴ When asked about this, a former commander of the FARC-EP and member of the Secretariat, affirmed that IHL 'was never on the agenda, as a priority, as an element to regulate our behaviour'.⁵⁵ In his words,

one has always heard that it is a matter developed by states, according to their interests. We were never considered ... For us it was a double-edged sword as we had rules of behaviour that arose from the essence, spirit and content of the political project we had. From there our behaviour derived, from there our norms derived, that had nothing to do with

⁴⁹ F. Manetto, 'El partido de las FARC nace con la aspiración de gobernar', *El País*, 2 September 2017, https://elpais.com/internacional/2017/09/01/colombia/1504290674_515345.html.

⁵⁰ HRW, *Colombia. Eventos de 2020*, <https://www.hrw.org/es/world-report/2021/country-chapters/377396#> (last accessed 1 January 2021).

⁵¹ 'Iván Márquez, Santrich y el Paisa vuelven a la lucha armada y lo anuncian desde el monte', *Semana*, 29 August 2019, <https://www.semana.com/nacion/articulo/ivan-marquez-santrich-y-el-paisa-vuelven-a-la-lucha-armada-y-lo-anuncian-desde-el-monte/629636/>.

⁵² According to the case law, there are two cumulative requirements for a non-international armed conflict to qualify as such and to trigger the applicability of IHL. First, there must be 'protracted armed violence' and second, violence must be conducted by government forces and at

least one organized armed group (or between such groups within a state or across a state's borders). See ICTY, *The Prosecutor v Dusko Tadić a/k/a 'Dule'*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, §70, <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (last accessed 29 December 2020). These conditions are fulfilled in the present case.

⁵³ UN Development Programme (ed), *El conflicto, callejón con salida: Informe Nacional de Desarrollo Humano para Colombia, 2003*, p 197, http://hdr.undp.org/sites/default/files/colombia_2003_sp.pdf (last accessed 1 January 2021).

⁵⁴ ICRC, *The Roots of Restraint in War*, supra fn 3, p 39.

⁵⁵ Interview with former commander of the FARC-EP, 6 July 2019.

those that were elaborated by states throughout history.⁵⁶

Another former member of the group followed the same line by noting that they would not deal with IHL because ‘they had no need ... It was, in addition, an agreement made by states in which we never took part’.⁵⁷

The FARC-EP had indeed argued in the past that IHL was ‘elitist’ and that it did not take the reality of the Colombian conflict into consideration.⁵⁸ As a result, the group affirmed that it would not agree to be bound by IHL, and that it was up to the group to interpret how IHL could apply.⁵⁹ Other statements by representatives of this ANSA follow this view:

The Protocol [II] obliges states experiencing armed conflict to abide by it. It is the government which must comply with it. They want us to recognise things that we are not: drug-traffickers, kidnappers, extortioners. They do this in order to deny us our place at the negotiating table.

The Farc does not violate human rights. We rose up precisely to fight for those rights ... We do not carry out executions. We do not murder the civilian population, whatever they do. That goes against our statutes.

⁵⁶ Ibid. According to him, IHL was a ‘double-edged sword’ because being ‘framed’ within the scope of IHL norms was ‘very complicated’.

⁵⁷ Interview with former commander of the FARC-EP, 4 July 2019.

⁵⁸ Sjöberg, ‘Challengers Without Responsibility?’, supra fn 41, p 193.

⁵⁹ Ibid.

⁶⁰ These various statements are included in J. Prieto Méndez, *Armed Opposition Groups and International Humanitarian Law Standards: A Comparative Look at Challenges and Strategies: The Case of Colombia*, International Council on Human Rights Policy 1999, pp 29–30. This was also noted by former FARC-EP members in discussions with HRW. See HRW, *Colombia: Beyond Negotiation: International Humanitarian Law and Its Application to the Conduct of the FARC-EP*, 2001, pp 6–7,

The president has indicated that he wants the guerrillas to abide by the Additional Protocols to the Geneva Conventions, but at the same time he blocks the possibility of the government and Farc meeting in La Uribe for peace talks. Neither will he allow us to meet with national and international organizations. Where is the sense in that? Does he want us to abide by agreements we have not signed and have not discussed?

The issue of ‘humanizing the war’ is also very important and must be addressed. But quite honestly, humanism and war contradict each other. If you ‘humanise’ the war you do so in order to prolong it and what we want is to end it, by eradicating the factors which have given rise to it. Today the top priority is to build paths for reconciliation.⁶⁰

According to a former member of the group, there were two moments when the FARC-EP addressed this international legal framework before the negotiations that led to the 2016 Peace Agreement:⁶¹ i) in discussions with the ICRC on the ground; and ii) at the time when the group attempted to be recognized as a ‘belligerent movement’.⁶² The ‘essence’ of the FARC-EP’s behaviours, he noted, ‘was based on the content

<https://www.hrw.org/reports/2001/farc/colmfarc0801.pdf> (last accessed 1 January 2021).

⁶¹ In the context of the peace negotiations that led to the 2016 Peace Agreement, the FARC-EP made certain commitments that are worth mentioning. As they are thematic in nature, notably on child protection, demining and gender equality and non-discrimination, they are addressed below in the norm-specific analysis.

⁶² Interview with former commander of the FARC-EP, 6 July 2019. In 1997 the Central High Command confirmed the moves of the FARC-EP at the international level to obtain ‘political recognition’ as a belligerent force. According to international law, recognition of belligerency, which is an outdated practice since the adoption of the Geneva Conventions, could have two effects, depending on which state recognizes this status of an ANSA: i) when the territorial state recognizes the non-state actor as a belligerent, the laws of war become applicable between the

of their political purpose'.⁶³ During the peace negotiations, however, the group had to acquire certain 'tools' and knowledge of international norms for 'political reasons'.⁶⁴

Some internal documents of the FARC-EP describe the meetings between the ICRC and the group. A letter by Raúl Reyes to Manuel Marulanda explains that an ICRC delegate had said that the idea was for the group 'to see each article of the international treaties on human rights, and that [the FARC-EP] would take from them' whatever was most convenient.⁶⁵ According to Reyes, the ICRC said that it is the responsibility of the state to respect human rights; yet the insurgency has fewer obligations that 'are not impossible to comply with', and that there are internal rules of the group that must be strengthened towards that goal.⁶⁶ Although these exchanges refer to international human rights law (IHL) in a broad sense – without focusing on specific rules –, it could have been the case that discussions also addressed the application of IHL, or rather 'humanitarian norms'. In another exchange, Londoño (Timochenko) described to the Secretariat a meeting with the ICRC in 1994, in which the ICRC presented 'allegations of cases of violations of fundamental rules of International Humanitarian Law' in 1992 and 1993.⁶⁷ The ICRC has also described some of its exchanges with the group. Its *Annual Report 2012*,

parties; ii) when third parties recognize belligerency between a state and an ANSA, the laws of neutrality became pertinent to the relationship between the recognizing state and the parties to the conflict. In order to be considered a belligerent, ANSAs need to fulfil three conditions. First, they are required to possess 'a given part of the national territory'; second, the ANSA has to fulfil 'the conditions which must be met to constitute a regular government exercising de facto in that part of the territory the ostensible rights belonging to sovereignty'; and third, their struggle has to be 'conducted by organized forces subject to military discipline and complying with the laws and customs of war'. International Law Institute, *Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*, Art 8, https://www.idi-il.org/app/uploads/2017/06/1900_neu_02_fr.pdf (last accessed 1 January 2021).

⁶³ Interview with former commander of the FARC-EP, 6 July 2019.

for instance, notes that it acted as a neutral intermediary between the Colombian Government and the FARC-EP, providing 'IHL advice in the context of the peace talks' and facilitating 'safe passage for the negotiators of both sides'.⁶⁸ Similar activities are described in its *Annual Report 2014*.⁶⁹

With regard to the possible recognition of belligerency, although the FARC-EP had begun reflecting on this in 1993, it was only during the abovementioned peace talks with the Andrés Pastrana government in the Caguán negotiations (1998–2002) that it became an actual goal.⁷⁰ In the context of these negotiations, the International Commission of the group tried to demonstrate that the FARC-EP fulfilled the criteria to obtain 'belligerent' status, for which it produced the document *Beligerancia* (Belligerency) in 2000. In this, the group affirmed that although it was not specifically committed to all related IHL norms and did not use 'the technical terms of IHL', its own internal rules were adjusted to this legal framework.⁷¹ This is because the FARC-EP was a revolutionary movement that considered 'humanism' as 'one of its logical pillars'.⁷² Similarly, *Beligerancia* explains that some internal documents – without actually listing them – include 'norms that seek to protect the civilian population from the conflict, establishing parameters that coincide with the

⁶⁴ Ibid.

⁶⁵ Comisión de Historia FARC-EP, *Resistencia de un pueblo en armas*, tomo 2, supra fn 12, p 664.

⁶⁶ Ibid.

⁶⁷ Ibid, pp 576–577.

⁶⁸ ICRC, *Annual Report 2012*, vol 1, p 372, <https://www.icrc.org/en/doc/assets/files/annual-report/icrc-annual-report-2012.pdf> (last accessed 1 January 2021).

⁶⁹ ICRC, *Annual Report 2014*, vol 1, p 40, <https://www.icrc.org/en/document/ICRC-annual-report-2014> (last accessed 1 January 2021).

⁷⁰ Aguilera Peña, *Guerrilla y población civil*, supra fn 16, pp 181–182.

⁷¹ FARC-EP, *Beligerancia*, supra fn 34, p 10.

⁷² Ibid, p 2.

basic principles of Humanitarian Law, such as the distinction between combatants and non-combatants, and the immunity [from attack] of the civilian population'.⁷³ The document also contains rules that follow certain international legal notions, notably on the possible conclusion of agreements on ceasefires, demilitarized zones, sanitary security zones, protection, evacuation and care for the wounded and sick. Furthermore, it mentions the possible exchange of prisoners 'as it is foreseen in art. 44 of the 1977 Additional Protocol I of Geneva'.⁷⁴ *Beligerancia* also includes the following statement related to the status of FARC-EP members:

The conditions established by the Geneva Conventions, in particular by Additional Protocol I, to consider those incorporated into the armed forces of an insurgent political party as 'legitimate combatants' are the following: a) That they wear a uniform known to the adversary, b) that they openly carry arms, c) that they are dependent on a responsible command, d) that they respect the laws and customs of war.

Taking these rules into account, FARC-EP militants must be considered, for all legal purposes, as 'legitimate combatants' of an insurgent force, existing in fact and recognized by law in the Colombian State.⁷⁵

In addition, there is a specific obligation for 'commanders and combatants' to 'study and practice the Norms of International Humanitarian Law according to the conditions

of [their] revolutionary war'.⁷⁶ This obligation was also included in the joint ELN and FARC-EP's 2009 Rules of Conduct with the Masses.⁷⁷ Interestingly, at the time that *Beligerancia* was published, HRW representatives met with FARC-EP commanders to discuss the application of IHL to the conduct of their troops.⁷⁸ A public report affirms that while several 'commanders were accessible and open to discussion', faced with an inventory of their abuses that included extrajudicial executions and kidnappings, 'they asserted that these standards [did] not apply to the FARC-EP and [were], in fact, inappropriate to the Colombian context'.⁷⁹

BOX 2: KEY FARC-EP POLICY DOCUMENTS RELATED TO IHL AND HUMAN RIGHTS NORMS

n.d. FARC-EP Statute

2000 *Beligerancia*

2001 Los Pozos Agreement

2007 Letter from the FARC-EP requesting belligerent status

2009 Rules of Conduct with the Masses

2012 Letter to the ICRC

2015 In Vindication of Human Rights⁸⁰

2016 Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace⁸¹

⁷³ Ibid, p 10.

⁷⁴ Ibid, p 12. Although the reference to the 1977 Additional Protocol I (AP 1) is indeed of relevance, it should be noted that it only applies to international armed conflicts; that is, conflicts that may arise between two or more states. Wars of national liberation are also included within the scope of this treaty. These have been defined as those conflicts 'in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination'.

⁷⁵ Ibid.

⁷⁶ Ibid, p 11.

⁷⁷ ELN/FARC-EP, Rules of Conduct with the Masses, Para 11, http://theirwords.org/media/transfer/doc/ut_co_farc_ep_el_n_2009_03_eng-d6eeb91f83eb1e9976140625c24ff870.pdf (last accessed 1 January 2021).

⁷⁸ HRW, *Colombia: Beyond Negotiation*, supra fn 60, p 2.

⁷⁹ Ibid.

⁸⁰ FARC-EP, En reivindicación de los derechos humanos, <http://cedema.org/ver.php?id=7012> (last accessed 1 January 2021).

⁸¹ The different commitments undertaken during the peace negotiations that led to the 2016 Peace Agreement have not been listed. They have, nonetheless, been referred to in this

As this list demonstrates, there are other public documents in which the FARC-EP dealt with certain IHL-related issues. In 2007, for instance, it published a communiqué addressed to ‘Heads of States’, inviting them ‘to contribute to the construction of Peace with Social Justice for Colombia through the recognition of the belligerent status that [it] has been conquering through these more than forty years of resistance and struggle for the rights of the Colombia people’.⁸² The same communiqué describes the group as a ‘Revolutionary Army with a stable and visible hierarchy of commands, with a revolutionary political project; ... as an option for political power’.⁸³ Furthermore, in a letter to the ICRC in 2012 – when the negotiations that led to the 2016 Peace Agreement had already started⁸⁴ – , the group said that despite the fact that ‘as a belligerent organization’ it had not signed any treaties, covenants or agreements, ‘it is a generalized practice and mandated by internal norms, to respect the principles of the law of nations and the humanitarian principles’.⁸⁵ In an interview conducted in the context of this research, a former commander of the group pointed out that IHL was considered as somehow included in their internal regulations as a matter of principle, ‘but not in a direct manner’.⁸⁶ He also added that fighters would study IHL during their ‘cultural hours’, as long as its content did not contradict the group’s internal regulations.⁸⁷ Similarly, the abovementioned letter to the ICRC

also affirms that the FARC-EP did not impose any obstacle to those aspects of IHL that benefit and protect the non-combatant population and the norms that ‘without compromising our precarious resistance capacities derived from the asymmetry of the conflict’ are aimed at those who act as combatants.⁸⁸

BOX 3: THE IHL POLICY OF THE EJÉRCITO DE LIBERACIÓN NACIONAL (NATIONAL LIBERATION ARMY, ELN)

Inspired by the Cuban Revolution and the Christian “liberation theology”, the ELN has been Colombia’s second largest ANSA since the 1960s. Its political goals have varied over the years. While its initial aim was to transform the capitalist political system into a socialist one, there has been a gradual shift away from the creation of a socialist state, and an increased focus on a popular democracy for all Colombians. To achieve that goal would mean to foster a socio-economic transformation. In contrast to the FARC-EP, the ELN was not conceived as a rural self-defence ANSA, but as a revolutionary guerrilla group, formed by ‘revolutionary militants’ from the Communist Party, the liberal left and trade unions. The ELN is a relatively decentralized group led by its *Comando Central*.

Unlike the FARC-EP, the ELN has publicly stated its goal of ‘humanizing’ the conflict since the mid-1980s.⁸⁹ At the time,

case study when addressing the FARC-EP policy with respect to specific norms.

⁸² FARC-EP, Las FARC demandan el reconocimiento del estatus como fuerza beligerante, 6 September 2007, <http://cedema.org/ver.php?id=2184> (last accessed 1 January 2021).

⁸³ Ibid. Interestingly, in 2008 the National Assembly of Venezuela approved a document recognizing the ‘belligerent’ status of the FARC-EP and the National Liberation Army. See, ‘La Asamblea Nacional de Venezuela otorga estatus político a las FARC y el ELN’, *El País*, 18 January 2008, https://elpais.com/internacional/2008/01/18/actualidad/1200610806_850215.html.

⁸⁴ Bermúdez Liévano, *Los debates de La Habana*, supra fn 45, p 21.

⁸⁵ FARC-EP, Señores Comité Internacional de La Cruz Roja (CICR), 9 November 2012,

http://theirwords.org/media/transfer/doc/co_farc_ep_2012_46-8be960f36e1a7bff63ee7ca4510e5e8a.pdf (last accessed 1 January 2021).

⁸⁶ Interview with former commander of the FARC-EP, 4 July 2019.

⁸⁷ Ibid. This statement seems to contradict statements made by other former commanders, who claimed that the FARC-EP considered international law and IHL to be an ‘elitist’ legal framework.

⁸⁸ FARC-EP, Señores Comité Internacional de La Cruz Roja (CICR), supra fn 85.

⁸⁹ This description of the relation between the ELN and IHL does not include the possible violations of this legal framework that this group may have committed, which have also been documented by various public sources.

the Colombian Government was actually reluctant to ratify AP II, which it ended up doing in 1995.⁹⁰ The group has in fact indicated its willingness to abide by IHL through different means. In 1995, for instance, it claimed that it 'ha[s] studied that Protocol I' insists on the fact that IHL is applicable to a party regardless of whether the other side decides to abide by it, and also 'that the guerrilla movement is not going to obtain belligerent status. We do not seek that. We fundamentally seek and adopt international humanitarian law as a benchmark in an independent and sovereign manner from the other party in conflict'.⁹¹ This is why it would later affirm in the same statement that 'we consider that we are covered by [AP II], as an Armed Group ... and we are an insurgent armed force, under a single leadership, so as to enable us to carry out sustained and concerted military operations and to comply, as we guarantee to do, with what is contained in the Geneva Protocol II'.⁹² The ELN's Code of War, which describes how the group should behave in combat, explicitly adheres 'to the norms of international humanitarian law'.⁹³

5. FARC-EP POLICY AND PRACTICE WITH REGARD TO SELECTED IHL NORMS

A. PROTECTION OF CIVILIANS FROM ATTACKS

1. DISCTINCTION

Under customary IHL,⁹⁴ the parties to a conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants; they must not be directed against civilians. Civilian objects are also protected against attacks.⁹⁵ Indiscriminate attacks are prohibited.⁹⁶ Article 13 of AP II – applicable to the conflict between Colombia and the FARC-EP since its ratification in 1995 – provides, in addition, that:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

⁹⁰ Interview with ELN commanders, 24 November 2019. Also, Interview with Carlos Medina Gallego, 2 July 2019; Prieto Méndez, *Armed Opposition Groups and International Humanitarian Law Standards*, supra fn 60, p 30.

⁹¹ ELN, Declaración sobre el derecho internacional humanitario, 15 July 1995, http://theirwords.org/media/transfer/doc/co_eln_1995_39-408bf9653321d87736df7b774a762e16.pdf (last accessed 2 January 2021).

⁹² Ibid.

⁹³ ELN, El código de guerra, http://theirwords.org/media/transfer/doc/co_eln_1995_01-89ff189bf16014583e81e00a88cd03d6.pdf (last accessed 2 January 2021).

⁹⁴ See Rule 1, ICRC CIHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul (last accessed 1 January 2021).

⁹⁵ Rule 7, *ibid.*

⁹⁶ Rule 11, *ibid.*

Civilians are persons who are not members of the armed forces;⁹⁷ they are protected against attack, unless and for such time as they take a direct part in hostilities.⁹⁸ Civilian objects are all objects that are not military objectives;⁹⁹ they are protected against attack, unless and for such time as they are military objectives.¹⁰⁰

Different FARC-EP internal regulations include norms related to the protection of civilians. While the content of some of them is more general in nature, others have explicit references to IHL and the rules on the conduct of hostilities.

In 2009, for example, the group ordered its units to '[r]espect the non-combatant population, its goods and interests and their social organizations'.¹⁰¹ In the ELN/FARC-EP's Rules of Conduct with the Masses, of the same year, the groups considered it a crime to murder members of the civilian population.¹⁰² When asked about those individuals who belonged to the category of 'civilian', a former commander of the FARC-EP affirmed that the group considered these to be 'those who [were] not armed, those who [were] not therefore involved in the military structure'.¹⁰³ When asked about specific categories of individuals, such as politicians, the same individual pointed out that they were not military targets, unless it was found that 'they were involved in the development of military

plans'.¹⁰⁴ He added that individuals were 'civilians' or 'state officials' depending on what they did, and 'those who made the laws and made the decisions that affected the populations were seen as a military target [as they] were part of the state that [the group] was fighting'.¹⁰⁵ When questioned about the differences between the Colombian national police and the armed forces, a former commander of the group explained that they would also consider the police as a party to the conflict, thus potentially targetable.¹⁰⁶ This is because, although 'at some point the police was attached to the Ministry of Interior, it was later transferred to the Ministry of Defence, which militarized it'.¹⁰⁷ Certain interpretations of the FARC-EP regarding who can be considered to be a civilian and who can be potentially targeted seemed nonetheless to differ according to the party it was fighting against. For instance, it has been reported that a 1994 communiqué by the José María Córdoba Bloc of the FARC-EP listed the following as military objectives:

1. Paramilitary informants and collaborators;
2. Traders who sell goods to hired gunmen;
3. Farmworkers on farms which are paramilitary bases;

⁹⁷ Rule 5, *ibid.*

⁹⁸ Rule 6, *ibid.*

⁹⁹ Rule 9, *ibid.*

¹⁰⁰ Rule 10, *ibid.* In so far as objects are concerned, 'military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'. (Rule 8, *ibid.*)

¹⁰¹ FARC-EP/ Ejército de Liberación Nacional (ELN), *A la militancia de las FARC-EP y del ELN*, November 2009, p 2, http://theirwords.org/media/transfer/doc/co_farc_ep_eln_2009_24-77c09953d8cba22d7d176d38dfe22b2b.pdf (last accessed 1 January 2021).

¹⁰² ELN/FARC-EP, *Rules of Conduct with the Masses*, supra fn 77, Para 8.

¹⁰³ Interview with former commander of the FARC-EP, 4 July 2019.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ For an analysis of the Colombian National Police status under IHL, see J. Serralvo, 'Clasificación de conflictos armados en Colombia', *Anuario Iberoamericano sobre Derecho Internacional Humanitario* 1 (2020), <https://www.unisabana.edu.co/programas/unidades-academicas/facultad-de-derecho-y-ciencias-politicas/anuariodih/articulos/clasificacion-de-conflictos-armados-en-colombia/> (last accessed 2 January 2021). There are numerous examples of the FARC-EP attacking the police. See M. Aguilera Peña, *Tomas y Ataques Guerrilleros (1965–2013)*, Centro Nacional de Memoria Histórica, 2016, <https://centrodememoriahistorica.gov.co/wp-content/uploads/2020/01/tomas-guerrilleras.pdf> (last accessed 1 January 2021).

¹⁰⁷ Interview with former commander of the FARC-EP, 4 July 2019.

4. So-called ‘hope commandos’, shown to be linked to those who massacre the people;
5. Peasant farmers who receive earnings from recognised paramilitaries;
6. Peasant farmers who sell their products to cooperatives which are paramilitary fronts, such as Coramar;
7. Police and soldiers who carry out massacres in collusion with hired gunmen;
8. The Urabá regional prosecutor’s office based at the 17th Brigade headquarters;
9. Anyone who knows something about [the paramilitarism] phenomenon but does not inform the FARC-EP disciplinary commissions;
10. In general, anything that smells paramilitary, including farmers, politicians or members of the military who support the paramilitaries.¹⁰⁸

As can be seen, such a position considers civilians who support or are perceived to support paramilitaries as legitimate targets. Of course, this reflects a specific time and scenario in which paramilitary groups were active in the Colombian context. Yet the fact that the FARC-EP publicly declared that as a result of a specific behaviour, including selling products, a civilian may become a ‘military target’ is worth noting. The above-mentioned list led a scholar to argue that although the group may be ‘willing to treat with respect those sectors of the population who support [it] ideologically or politically, or who form [its] “social base”’, it is not willing to give ‘a similar treatment to those who appear to be

closer to the state armed forces or who are perceived as a the “social base of the paramilitaries”’.¹⁰⁹

2. PROPORTIONALITY AND PRECAUTION

Under customary IHL, it is prohibited to carry out an attack that may be expected to cause excessive harm to civilians and civilian property compared to the anticipated military advantage (proportionality).¹¹⁰ In addition, in the planning and conduct of military operations, the parties to the conflict must do everything feasible to avoid or minimize collateral damage (precaution). Constant care must be taken to spare civilians and civilian objects.¹¹¹

With respect to the rules of proportionality and precaution, a former commander of the FARC-EP explained that military operations were planned.¹¹² The commanders needed to know, for instance, ‘how many men were in a garrison, or in a vehicle, how often [the enemy] would go through a certain sector, the weapons they carried. Then, they would assess the number of fighters they would need to use for the military operation, the type of weapon and the clothing, because it depended on whether it was in the jungle, in an urban area or in a semi-rural one’. And all that, according to the interviewee, was collected through the group’s intelligence activities.¹¹³ However, a different member of the FARC-EP also noted that ‘[n]o attack without surprise is effective, and if you warn, it lessens your weight. But when discussing military plans or taking positions or ambushes it was sought not to affect the civilian population’.¹¹⁴ When asked about the notion of ‘military necessity’, this same member explained that ‘the military struggle was very much connected to the political one. Of course, for us the goal was to militarily defeat the adversary, but also having in

¹⁰⁸ Prieto Méndez, *Armed Opposition Groups and International Humanitarian Law Standards*, supra fn 60, p 31.

¹⁰⁹ Ibid.

¹¹⁰ Rule 14, ICRC CIHL Database, supra fn 94.

¹¹¹ Rule 15, ibid.

¹¹² Interview with former commander of the FARC-EP, 4 July 2019.

¹¹³ Ibid.

¹¹⁴ Interview with former commander of the FARC-EP, 4 July 2019.

mind that our goal was a political one'.¹¹⁵ In Colombia, he added, 'there was a phenomenon that the state would have to respond to in due course, which was the use of the civilian population as a shield'.¹¹⁶ This notion was included in different written documents. For instance, in various public declarations, the FARC-EP criticized the fact that the state placed military headquarters and police stations near the civilian population and civilian buildings, such as schools and commercial areas.¹¹⁷ 'We can list them all', the FARC-EP said, which 'shows that the State preaches [the respect of IHL] but does not apply it. The use of the population as a human shield' is evident.¹¹⁸ 'Using the civilian population for that', one interviewee said, 'is a violation of international humanitarian law that at some point we will have to sit down and talk to the state about so that they respond in some way'.¹¹⁹

Another representative of the group noted during an interview that there were many military actions that ended up interrupted because the civilian population was present:

Because this is what we had as a principle. This is why we often said that international humanitarian law [was] not in our interest. Because we had the protection of civilians as a principle. In addition to that, if we affected the civilian population of the countryside,

who were we affecting? The same parents, brothers, nephews and cousins, even children, of the same guerrillas. So why would we attack the civilian population, if we owed ourselves to this same population? Because we could not eat, we could not have medicines, if it were not for the help and constant support of the civilian population. An irregular army ... could not exist without the support of the masses, or what you call the civilian population.¹²⁰

Similarly, in a public communiqué the FARC-EP recommended to the civilian population that they neither let military or police stations be placed near their houses, nor let police officers inside their civilian vehicles.¹²¹ In this document it was also indicated that the civilian population 'must refrain from boarding military vehicles of any kind', and that '[c]ivilian vehicles on the roads must keep a minimum distance of 500 meters from military vehicles and caravans'.¹²² These recommendations were also repeated during an interview with a former member of the group.¹²³ Other recommendations include that the civilian population abstain from serving as guides for the governmental forces in rural areas and refrain from entering military garrisons or police barracks.¹²⁴

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ FARC-EP, Declaración pública relativa a escudos humanos en Medellín, n.d., http://theirwords.org/media/transfer/doc/co_farc_ep_2011_30-e5c01df27160d29fc0701416d878408c.pdf (last accessed 1 January 2021); FARC-EP, Comunicado del Bloque Sur y recomendaciones a la población civil, December 2008, http://theirwords.org/media/transfer/doc/co_farc_ep_2008_28-8a41dad59e38814764f65c02b960c0d.pdf (last accessed 1 January 2021).

¹¹⁸ FARC-EP, Declaración pública relativa a escudos humanos en Medellín, supra fn 117; FARC-EP, Comunicado del Bloque Sur y recomendaciones a la población civil, supra fn 117.

¹¹⁹ Interview with former commander of the FARC-EP, 4 July 2019.

¹²⁰ Interview with former commander of the FARC-EP, 4 July 2019. Although this statement could be read as the former commander pointing out that IHL is not a protective legal framework for civilians (unlike the group's internal regulations), it was highlighted during the interview that it was a matter of sources and the relevance of the FARC-EP's own legal framework.

¹²¹ FARC-EP, Comunicado del Bloque Sur y recomendaciones a la población civil, supra fn 117.

¹²² Ibid.

¹²³ Interview with former commander of the FARC-EP, 4 July 2019.

¹²⁴ FARC-EP, Comunicado del Bloque Sur y recomendaciones a la población civil, supra fn 117, Paras 1–2.

3. PUBLIC REPORTS ON THE FARC-EP'S PRACTICES REGARDING THE PROTECTION OF CIVILIANS FROM ATTACKS

Despite these rules and statements, reports of violations of the rules on the conduct of hostilities by the FARC-EP have been numerous. The UN Office of the High Commissioner for Human Rights (OHCHR), for instance, claimed in 2006 that several attacks in the Cauca region, as well as in the department of North Santander and Puerto Guzmán were 'attacks conducted against the civilian population and ... indiscriminate attacks attributed to the FARC-EP, with serious consequences for individuals and civilian property. Cases involving children, owing to the use of schools as an operational base or because they were close to the target of attacks, were considered particularly serious'.¹²⁵ In 2007, OHCHR attributed to the FARC-EP direct attacks against the civilian population in Arauca, as well as indiscriminate attacks in Caquetá and Nariño.¹²⁶ In the same report, it said that in Caldas, on 4 March 2006, the group attacked the local police, throwing cylinder bombs and grenades and firing with rifles and machine guns 'without taking precautionary measures in favour of the civilian population. The attack left 3 civilians dead, including a 6 month-old boy, and 11 injured'.¹²⁷

In July 2011, OHCHR also reported a FARC-EP attack allegedly directed at the Toribio (Cauca

region) Police station, on a market day and near the main square of the municipality, where approximately 1,500 civilians were present, resulting in the death of 3 civilians and injuring 122.¹²⁸ Similar reports were included in the International Criminal Court (ICC) Office of the Prosecutor's Interim Report on Colombia of 2012, where it is said that the FARC-EP (and to a lesser extent, the ELN) 'developed and focused their military operations on gaining control and exercising power over parts of Colombian territory which they could expropriate for political and financial gain. Pursuant to this policy, the FARC and ELN launched widespread and systematic attacks against the civilian population with the aim of expropriating land and subsequently gaining political, economic and social control over the targeted territory'.¹²⁹

There have also been reports regarding the respect for the conduct of hostilities principles in relation to the use of certain weapons by the group, in particular the use of anti-personnel landmines.¹³⁰



¹²⁵ Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia, UN doc E/CN.4/2006/9, 20 January 2006, §55.

¹²⁶ Human Rights Council (HRC), Informe de la Alta Comisionada de Las Naciones Unidas para los Derechos Humanos sobre la situación de los derechos humanos en Colombia, UN doc A/HRC/4/48, 5 March 2007, §74.

¹²⁷ Ibid, §52.

¹²⁸ HRC, Annual Report of the United Nations High Commissioner for Human Rights. Addendum: Report of the United Nations for Human Rights on the Situation of Human Rights in Colombia, UN doc A/HRC/19/21/Add.3, 31 January 2012, §88.

¹²⁹ International Criminal Court (ICC), Office of the Prosecutor (OTP), Situation in Colombia: Interim Report,

November 2012, §41, <https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf> (last accessed 1 January 2021).

¹³⁰ See Section 5.H of this case study for further information on the use of landmines by the FARC-EP. Although this will indeed be analysed below, it has been reported that in 2001 a former commander of the FARC-EP responded to the use of these improvised explosive devices by explaining that their affecting civilians was a mistake caused by their 'rudimentary' nature, and promising that they would restrict their use to 'strictly military' objectives and not use them in operations where civilians were present. Aguilera Peña, *Tomas y Ataques Guerrilleros (1965-2013)*, supra fn 106, p 276.

B. THE PROHIBITION OF SEXUAL VIOLENCE AND GENDER DISCRIMINATION¹³¹

Under customary IHL,¹³² rape and other forms of sexual violence are prohibited. While common Article 3 of the 1949 Geneva Conventions does not explicitly refer to this terminology, it prohibits ‘outrages upon personal dignity, in particular humiliating and degrading treatment’. Article 4(1)(c) of AP II specifically adds ‘rape’, ‘enforced prostitution’ and ‘any form of indecent assault’ to this list.

The Statute of the FARC-EP explicitly includes the prohibition of ‘rape’.¹³³ During the talks that led to the 2016 Peace Agreement, the group also affirmed that it

emphatically reject[s] the ongoing media campaign against the FARC-EP in order to demonize us and present us as systematic violators of women’s rights. Nothing could be further from the reality of an insurgency that counts on the valuable contribution of many women who make up 40% of its members.

It would be illogical for an insurgent organization that has resisted one of the strongest military onslaughts in Latin America and the world for more than 51 years, to assault civilians, or even worse, sexually abuse their guerrilla

combatants and women from the population.¹³⁴

When addressing the sexual violence issue within the group, Camila Cienfuegos, a former member of the group’s delegation during the La Habana peace talks, claimed that those acts were not promoted by the FARC-EP and were severely punished.¹³⁵ In one of the interviews conducted in the context of this research, a former member of the group explained that although she had never seen or experienced sexual abuse, the FARC-EP was a big group, which covered the national territory, and

it is possible that, at some point, somewhere in the geography and in those structures, an incident may have occurred. If it had happened, the organization had important internal legislations, notably its Statute and norms and regulations, where sexual violence and rape of women or men was classified as a crime. It would go to the Council of War, where it was decided if the alleged perpetrator was acquitted or guilty, which could entail the maximum penalty: execution.¹³⁶

This echoes other statements by the FARC-EP. For instance, in 2015 the group affirmed that rape was a crime punished ‘with the maximum penalty contained in [their] regulations, through

¹³¹ In its General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, of 18 October 2013, the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) states: ‘Under international human rights law, although non-State actors cannot become parties to the Convention, the Committee notes that under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights’. The Committee goes on to urge ‘non-State actors such as armed groups: (a) to respect women’s rights in conflict and post-conflict situations, in line with the Convention; (b) to commit themselves to abide by codes of conduct on human rights and the prohibition of all forms of gender-based violence’. UN doc CEDAW/C/GC/30, 18 October 2013, §§16 and 18.

¹³² Rule 93, ICRC CIHL Database, *supra* fn 94.

¹³³ FARC-EP, Estatuto, Ch 1, Art 3(K).

¹³⁴ FARC-EP, The FARC-EP Rejects Sexual Crimes Against Women, 1 August 2015, http://theirwords.org/media/transfer/doc/farc_ep_unilateral_declaration_asking_for_an_independent_investigation_on_victims_of_sexual_violence_in_colombia-9753cf72411080df2086475d54b1be8a.pdf (last accessed 2 January 2021).

¹³⁵ J. Rei, ‘Camila Cienfuegos, de la guerrilla de las FARC a la Política feminista’, *El Español*, 15 November 2017, https://www.lespanol.com/mundo/america/20171114/261974859_0.html.

¹³⁶ Interview with former female commander of the FARC-EP, 3 July 2019. Similar views were espoused in the past. See J. McDermott, ‘Colombia’s Female Fighting Force’, *BBC News*, 4 January 2002, <http://news.bbc.co.uk/2/hi/americas/1742217.stm>.

a decision taken at a revolutionary war council in which the guerrilla combatants play the role of judge'.¹³⁷ The group also said that '[a]ny case that may have occurred since our founding as a revolutionary organization ... do not represent a systematic policy of the FARC-EP'.¹³⁸ In the same statement, the group proposed 'a serious and independent investigation' to describe 'the whole universe of victims of sexual violence in Colombia and discover the way, the time and the place in which the events took place'.¹³⁹ In particular, it advocated the creation of a research team 'that should specifically focus on conflict-related sexual and gender-based violence'.¹⁴⁰ Although focusing on how organizational aspect of the group, the FARC-EP also had certain norms governing sexual relations between its members, which were permitted but only in a regulated manner,¹⁴¹ and with civilians, with whom members were not allowed to spend the night (pernoctar).¹⁴²

Internal documents of the group also contain rules dealing with both gender equality and the prohibition of gender discrimination. In the General Conclusions of the Eighth National Guerrilla Conference, which took place in 1993, it is affirmed that

[i]n the FARC-EP there can be no discrimination against women, who, as the regulatory requirements state, have the same rights as men. Whoever discriminates against women will be sanctioned according to the Regulations, be they Commanders or ground fighters. The woman in the guerrilla is free.¹⁴³

¹³⁷ FARC-EP, The FARC-EP Rejects Sexual Crimes Against Women, supra fn 134.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Amnesty International, 'Scarred Bodies, Hidden Crimes: Sexual Violence Against Women in the Armed Conflict' 13 October 2004, <https://reliefweb.int/report/colombia/colombia-scarred-bodies-hidden-crimes-sexual-violence-against-women-armed-conflict> (last accessed 2 January 2021).

¹⁴² FARC-EP, Estatuto, Art 3(r).

In 1987, the FARC-EP had already publicly noted the possible 'machismo' of its members, affirming that this is not what 'revolutionaries' are renowned for.¹⁴⁴ In a public statement, a former fighter affirmed that

any type of discrimination is strictly prohibited ... Here we form men and women in the first line of fire, and there are many women fighters who distinguish themselves at the time of combat. Kitchen work, which we call *rancha*, is rotated daily among all combatants, regardless of their gender. The woman becomes commander in the same way as the man, by virtue of her merits in the revolutionary work. There are women integrating in some Central Commands ... The recent incorporation of women in a massive way into this fight alone explains why none of us has a place in the highest spheres of leadership of the organization. But there is no doubt that we will be there in due course. Because the opportunity to ascend is never denied to us.¹⁴⁵

The abovementioned Camila Cienfuegos also claimed that within the FARC-EP there 'was much more equality and parity than in the rest of the society. Gender roles did not exist. We all had to carry the gun, cook, clean, regardless of being male or female'.¹⁴⁶ This seems to echo a 2015 statement of the group, in which it 'categorically affirm[s] that in the ranks of the FARC-EP there's no place for violence against women; there is only a place for love, camaraderie, respect, and

¹⁴³ FARC-EP, Octava Conferencia Nacional de Guerrillero, 23 de mayo-3 de abril 1993, Art 14.

¹⁴⁴ This information was found on the FARC-EP website, which is no longer available at the time of this case study's publication.

¹⁴⁵ M. Páez, 'Las FARC-EP, El Desempleo y La Mujer', La Haine, 17 January 2014, <https://www.lahaine.org/mundo.php/las-farc-ep-el-desempleo-y-la-mujer> (last accessed 2 January 2021).

¹⁴⁶ Rei, 'Camila Cienfuegos', supra fn 135. It has been reported, however, that this 'equality' was not applicable to all aspects of FARC-EP members' daily life.

recognition towards them. Proof of this is the broad participation of women in [the FARC-EP's peace] Delegation'.¹⁴⁷ Cienfuegos nonetheless added that 'machismo is rooted in [Colombian] society, it is a social construction from which it is not easy to get out, so it also existed in the organization, of course it did'.¹⁴⁸ Former fighters have indeed asserted that women were discriminated against when being assigned to unwanted duties, such as cooking and playing guard at difficult hours.¹⁴⁹ It has also been said that discrimination against women was present in other cases. For instance, while male fighters were allowed to form relationships outside the group's ranks, women and girls were not.¹⁵⁰

In spite of these rules and prohibitions, Amnesty International reported that FARC-EP members were responsible for rapes or other acts of sexual violence. The victims were notably women and girls who had first been declared 'military objectives', as a punishment for associating or 'fraternizing' with soldiers, police or paramilitary members.¹⁵¹ This NGO also claimed that, on certain occasions, female hostages were allegedly also raped by FARC-EP members, as well as women combatants of the

group itself.¹⁵² Women and girl fighters have reported abuses, often by superiors, who would use their position of power¹⁵³ or the grounds of an alleged 'revolutionary duty' to have sex with male colleagues to obtain sexual services.¹⁵⁴ 'Sexual services' or being in a relationship with a commander would also provide women and girls with a certain improvement in their status or make their lives easier. In this sense, HRW claimed in 2019 – though referring to a 2003 report¹⁵⁵ – that male FARC-EP commanders often used their power to coerce girls into service as their sexual partners and forced girls as young as 12 to use contraception and 'to have abortions if they got pregnant'.¹⁵⁶ Yet according to HRW, the FARC-EP had also declared that it 'only "promoted the use of contraceptives," while commanders "explained" to women entering the ranks that "pregnancies were not allowed" [and that] "[p]regnant women had to make the decision to continue a pregnancy and leave the ranks, or to end their pregnancy"'.¹⁵⁷ It has been reported, however, that the FARC-EP had a different approach with respect to forced abortion, which depended on women's

¹⁴⁷ FARC-EP, *The FARC-EP Rejects Sexual Crimes Against Women*, supra fn 134.

¹⁴⁸ Rei, 'Camila Cienfuegos', supra fn 135. It has been argued, in fact, that 'it would seem that female combatants in the FARC, similar to women entering armed forces ... escape certain forms of gender discrimination within the Colombian society and experience various forms of empowerment, while at the same time being subjected to new forms of oppression'. R. Kunz and A.-K. Sjöberg, 'Empowered or Oppressed? Female Combatants in the Colombian Guerrilla: The Case of the Revolutionary Armed Forces of Colombia – FARC', Paper Prepared for the Annual Convention of the International Studies Association, 2009, p 33, <https://genderingworldpolitics.files.wordpress.com/2017/10/kunz-empowered-or-oppressed.pdf> (last accessed 2 January 2021).

¹⁴⁹ P. Lara, *Las mujeres en la guerra*, Editorial Planeta, 2000, p 65.

¹⁵⁰ McDermott, 'Colombia's Female Fighting Force', supra fn 136.

¹⁵¹ Amnesty International, 'Scarred Bodies, Hidden Crimes', supra fn 141, p 23.

¹⁵² Ibid. The report refers to a bacteriologist working with indigenous peoples who was 'kidnapped' in August 2003 in the Sierra Nevada of Santa Marta, and 'allegedly repeatedly raped by the local FARC commander, "Beltrán", while being held captive'.

¹⁵³ Ibid.

¹⁵⁴ Sjöberg, 'Challengers Without Responsibility?', supra fn 41, p 188.

¹⁵⁵ HRW, *You'll Learn Not To Cry*, supra fn 13.

¹⁵⁶ J. M. Vivanco, 'El falso relato de las Farc sobre el reclutamiento infantil / Opinión', *El Tiempo*, 10 March 2019, <https://www.eltiempo.com/politica/proceso-de-paz/el-falso-relato-de-las-farc-sobre-reclutamiento-infantil-jose-miguel-vivanco-336160>. The reference to the 2003 report is included in the HRW version of Vivanco's piece, <https://www.hrw.org/es/news/2019/03/11/el-falso-relato-de-las-farc-sobre-reclutamiento-infantil> (last accessed 1 January 2021).

¹⁵⁷ Ibid. See also ICRC, *The Roots of Restraint in War*, supra fn 3, p 41.

hierarchical position within the group or on their relations with the commanders.¹⁵⁸

The FARC-EP were mentioned in different international reports regarding cases of sexual violence against women and girls. In 2009, for instance, OHCHR was informed of cases of 'rape in Tolima and recruitment ... of women and girls in Antioquia, who were also victims of forced contraception'.¹⁵⁹ Moreover, the group was mentioned for the first time in the Report of the UN Secretary-General on conflict-related sexual violence in 2012, which raised concern about acts of sexual violence by the group, alongside other Colombian ANSAs. It was reported that girls were required to have sexual relations with adults at an early age and were forced to abort if they became pregnant. Women and girls were also forced to use harmful methods of contraception.¹⁶⁰ Between 2016 and 2019, the UN Secretary-General's reports have nonetheless highlighted the efforts undertaken by the FARC-EP and the Colombian Government in the context of the peace process to bring justice to victims of sexual violence, noting that even

when the number of incidents diminished after the demobilization, there was a potential for an increase in violence by FARC-EP dissident groups.¹⁶¹ Reports of the UN Secretary-General on children and armed conflict have also regularly reported possible cases of sexual violence by the FARC-EP.¹⁶²

Finally, the ICC has reported that there is a reasonable basis to believe that the FARC-EP and other Colombian groups each committed crimes against humanity and war crimes in the form of rape and other forms of sexual violence since 1 November 2002.¹⁶³ In 2018, the ICC Office of the Prosecutor noted that the Attorney-General's Office presented two reports to the Special Jurisdiction for Peace related to 1,080 sexual and gender-based crimes allegedly committed by armed forces and FARC-EP former members, involving approximately 1,246 victims, including civilians and members of their own ranks, and comprising rape, forced nudity, femicides, sexual slavery and forced prostitution.¹⁶⁴

¹⁵⁸ Centro Nacional de Memoria Histórica, *La guerra inscrita en el cuerpo: Informe nacional de violencia sexual en el conflicto armado*, November 2017, pp 178–180, <https://centrodememoriahistorica.gov.co/wp-content/uploads/2020/05/la-guerra-inscrita-en-el-cuerpo.pdf> (last accessed 2 January 2021).

¹⁵⁹ HRC, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia, UN doc A/HRC/13/72, 4 March 2010, §44.

¹⁶⁰ UNGA/UNSC, Conflict-Related Sexual Violence: Report of the Secretary-General, UN doc A/66/657–S/2012/33, 13 January 2012, §18.

¹⁶¹ UNSC, Report of the Secretary-General on Conflict-Related Sexual Violence, UN doc S/2016/361, 20 April 2016, §30; UN Secretary-General (UNSG), *Report of the Secretary-General on Conflict-Related Sexual Violence*, UN doc S/2017/249, 15 Apr 2017, §§25–27, <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/report/s-2017-249/SG-Annual-Report-spread-2016.pdf> (last accessed 2 January 2021); UNSG, *Report of the Secretary-General on Conflict-related sexual violence*, UN doc S/2018/250, 16 Apr 2018, §§31–32, <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/report/s-2018-250/SG-REPORT-2017-CRSV-SPREAD.pdf> (last accessed 2 January 2021); UNSG, *Conflict-Related Sexual Violence: Report of the Secretary-General*, UN doc S/2019/28029, March 2019, §§40–41,

<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/04/report/s-2019-280/Annual-report-2018.pdf> (last accessed 2 January 2021).

¹⁶² UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia (September 2011–June 2016), UN doc S/2016/837, 4 December 2016; UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia, UN doc S/2009/434, 28 August 2009; UNGA/UNSC, Children and Armed Conflict: Report of the Secretary-General, UN doc A/61/529–S/2006/826, 26 October 2006, §83.

¹⁶³ ICC, OTP, Report on Preliminary Examination Activities (2013), November 2013, §§124–125, <https://www.icc-cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF> (last accessed 2 January 2021). It should be noted that the ICC may exercise its jurisdiction over those crimes enshrined in the Rome Statute and committed on the territory or by the nationals of Colombia since 1 November 2002, following the state's ratification of the Statute on 5 August 2002. However, it only has jurisdiction over war crimes committed since 1 November 2009, when Colombia made a declaration pursuant to Art 124 of the Rome Statute.

¹⁶⁴ ICC, OTP, Report on Preliminary Examination Activities (2018), 5 December 2018, §148, <https://www.icc->

Important steps were undertaken by the FARC-EP and the Colombian Government in the context of the negotiations that led to the 2016 Peace Agreement. In particular, on September 2014 they agreed to create a Gender Sub-commission, which was tasked with reviewing all documents issued as part of the peace process to ensure they included gender-sensitive language and provisions.¹⁶⁵ The 2016 Peace Agreement includes 100 provisions on gender equality and women's human rights, several of which address conflict-related sexual violence and gender issues. For instance, the parties created the Truth, Coexistence and Non-Recurrence Commission, an independent, impartial mechanism with an extrajudicial nature, and committed to '[e]nsure that the gender-based approach runs through each and every aspect of the Commission, by creating a gender-based task force in charge of specific tasks, investigation and holding of hearings'.¹⁶⁶ The judicial component, also established in the context of the Agreement, would function 'in a way that emphasizes the needs of women and child victims, who suffer the disproportionate and differentiated effects of serious breaches and violations committed because of and during the conflict'.¹⁶⁷ The same provision acknowledges that reparations must adopt a 'gender focus, recognizing reparative and restorative measures, the special suffering of women, and the importance of their active and fair participation in the judicial component of the [Comprehensive

System for Truth, Justice, Reparations and Non-Recurrence]'.¹⁶⁸ The Peace Agreement also recognizes that sexual violence was among the different forms of victimization.¹⁶⁹ It has been reported, however, that only 4 percent of the totality of provisions in this area were implemented by mid-2018.¹⁷⁰

BOX 4: THE FARC-EP AND THE EXISTENCE OF INTRA-PARTY CRIMES

On 11 December 2019, Colombia's Constitutional Court decided on a case related to the protection of a woman (Helena) who had been forcibly recruited by the FARC-EP and subjected to forced contraception and forced abortion. The case was against a decision by the Colombian Unit for Comprehensive Attention and Reparation to Victims (UARIV) and Capital Salud E.P.S., which had refused to recognize her as a victim of the FARC-EP – and thus to include her in the Single Registry of Victims. Their decision was based on Law 1448 of 2011, which states that 'members of organized armed groups outside the law will not be considered as victims, except in cases in which children or adolescents had been dissociated from the organized group outside the law as minors'.¹⁷¹ The Constitutional Court overturned the denial of victim status, concluding that 'the forced contraception and forced abortion inflicted on Helena constituted both breaches of her fundamental rights as well as war crimes'.¹⁷² Although this decision focuses on the recognition of the victims' status, it is relevant as it admits the

[cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf](https://www.cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf) (last accessed 2 January 2021).

¹⁶⁵ K. Herbolzheimer, *Innovations in the Colombian Peace Process*, Norwegian Peacebuilding Resource Centre, June 2016, p 6, <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/0e5206132095b3f2bdb7c3877690a538.pdf> (last accessed 2 January 2021).

¹⁶⁶ Art 5.1.1.1.4, Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace Between the National Government of Colombia and the Revolutionary Armed Forces of Colombia–People's Army (FARC-EP) (2016 Peace Agreement), <https://www.peaceagreements.org/viewmasterdocument/1845> (last accessed 2 January 2021).

¹⁶⁷ Art 5.1.2(8), *ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, p 134.

¹⁷⁰ UNSG, *Conflict-Related Sexual Violence*, 2019, *supra* fn 161, §40.

¹⁷¹ Law on attention, assistance and integral reparation to the victims of the internal armed conflict and other provisions, 2011, <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/6589340762217632C1257B8600311912> (last accessed 2 January 2021).

¹⁷² C. Laverty and D. de Vos, "Ntaganda" in Colombia: Intra-Party Reproductive Violence at the Colombian Constitutional Court', *Opinio Juris*, 25 February 2020, <https://opiniojuris.org/2020/02/25/ntaganda-in-colombia-intra-party-reproductive-violence-at-the-colombian-constitutional-court/> (last accessed 2 January 2021).

possible existence of war crimes with respect to intra-party crimes, as well as for its conclusion that forced contraception and forced abortion are forms of sexual and gender-based violence, which could constitute war crimes.

C. THE PROHIBITION OF USING AND RECRUITING CHILDREN IN HOSTILITIES

IHL and IHRL prohibit the recruitment of children into armed forces or armed groups and their participation in hostilities.¹⁷³ While AP II sets the minimum age for recruitment and participation in hostilities at 15 years, Article 4(1) of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict requires that '[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years'.¹⁷⁴

The issue of the prohibition of using and recruiting children in hostilities was discussed within the FARC-EP during the Seventh National Guerrilla Conference (1982),¹⁷⁵ which resulted in the adoption of internal regulations:

¹⁷³ Rules 136 and 137, ICRC CIHL Database, *supra* fn 94; Art 4, Para 3(c)(d) and (e), Additional Protocol II to the Geneva Conventions (AP II); Art 4(1) of Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC). In the Commentary on Rule 137, the ICRC notes:

In the framework of the war crime of 'using children to participate actively in hostilities' contained in the Statute of the International Criminal Court, the words 'using' and 'participate' have been adopted in order to:

cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology. (ICRC CIHL Database, *supra* fn 94, last accessed 2 January 2021).

Recruitment: The Fronts will create recruitment commissions, which must be prepared with strict tact to recruit men and women, who must be evenly matched between 15 and 30 years old ... The recruits must be physically fit and mentally mature, i.e., clear about why he or she is joining [the FARC-EP]. Recruitment depends on the area of population and the development of the Front.¹⁷⁶

In a written document produced during the discussions that led to the 2016 Peace Agreement, the group affirmed that '[c]oinciding with the IHL, the FARC-EP rules of recruitment don't allow enlistment of children under 15 years and those rules are clear regarding age'.¹⁷⁷ This is relevant when considered that the prohibition contained in IHL was only applicable in Colombia in 1995, when the state ratified AP II.

When questioned about the minimum age, as it was established in 1982, a former commander and member of the Secretariat, who was present at the Seventh National Conference, explained that there was a discussion at the time because 'many boys and girls of 12, 13 and 14 years old

¹⁷⁴ Art 8(b)(xxvi) of the Rome Statute lists as a war crime 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities'. Although there is a growing trend towards a prohibition of any form of military recruitment or use in hostilities of persons under the age of 18 years, for the purpose of this research, we consider ANSAs to be bound by the 15-years standard and that any commitment to the 18-years limit for recruitment of children in their armed forces goes beyond their strict obligations under international law.

¹⁷⁵ Interview with former commander of the FARC-EP, 6 July 2019.

¹⁷⁶ This information was found on the FARC-EP website, which is no longer available at the time of this case study's publication.

¹⁷⁷ FARC-EP, Announcement on Minors in the Conflict, 15 February 2015, http://theirwords.org/media/transfer/doc/farc_ep_announcement_on_minors_in_the_conflict-e6c1d31649e5c1560d3487a1740e48c0.pdf (last accessed 2 January 2021).

from the countryside asked to be admitted'. According to him, when rejected, they would 'take other paths, becoming bandits or go to other groups. They were lost'. To explain the 15-years minimum age for recruitment, he said that 'boys and girls at that age may have already participated in social life, consumed alcohol, worked and had sexual relations'.¹⁷⁸ The key element for the FARC-EP was that the specific individual was both mentally and physically suitable to become a member of the group: 'there were 15-year-old boys who had the spirit of an 18-year-old man. But there are 15-year-old people who look like an 8-year-old child both from mental and physical perspectives'.¹⁷⁹

Other members of the FARC-EP have also publicly addressed the prohibition of using and recruiting children in hostilities. During an interview conducted in the context of this research, a different former commander was asked about the training that children would receive once in the group, and if they would be sent to the battlefield after joining the FARC-EP. He replied that in every bloc there were basic schools: 'let's say there was a group of 60 boys and girls joining us. There was a basic course that lasted two, three, four months [before going to the front]. The first obligation they had was to learn the Statue, which for us was a sort of control mechanism. This obligation helped us a lot now during the peace process because it created support from the different communities

with whom the content or our rules had been discussed'.¹⁸⁰

Despite some of the abovementioned statements, there were continuous allegations throughout the conflict that the FARC-EP recruited children, including girls as young as 12.¹⁸¹ Amnesty International has documented specific cases in which children who refused to be recruited were actually killed.¹⁸² According to a report issued by the Special Jurisdiction for Peace, the Prosecutor's Office has registered 5,252 victims of child recruitment between 1971 and 2016 by this group. Despite the fact that at the time the minimum age for recruitment was formally of 15 years, the report claims that almost half of the children were recruited before reaching that age.¹⁸³ In 2003 the situation in Colombia was brought to the attention of the UN Security Council and the FARC-EP was listed for its recruitment and use of children.¹⁸⁴ In the context of this institutional framework, data received by the UN between 2011 and 2016 shows a total of 1,556 cases, with some children as young as 8 years old being reportedly recruited. Most verified cases, the report notes, were attributed to the FARC-EP, mostly affecting indigenous and Afro-Colombian communities in rural areas and carrying promises of food, money, protection or other support and benefits for families; in some circumstances, children were forced to commit crimes as serious such as

¹⁷⁸ Interview with former commander of the FARC-EP, 6 July 2019.

¹⁷⁹ Ibid.

¹⁸⁰ Interview with former commander of the FARC-EP, 6 July 2019.

¹⁸¹ Amnesty International, 'Scarred Bodies, Hidden Crimes', supra fn 141.

¹⁸² Amnesty International, 'Leave Us in Peace', supra fn 13, p 49.

¹⁸³ JEP, JEP abre caso 007: Reclutamiento y utilización de niñas y niños en el conflicto armado Colombiano, Comunicado 031, 2019, <https://www.jep.gov.co/Sala-de-Prensa/Paginas/Comunicado-031-de-2019---JEP-abre-caso-007-Reclutamiento-y-utilizaci%C3%B3n-de-ni%C3%B1as-y-ni%C3%B1os-en-el-conflicto-armado-colombiano.aspx> (last accessed 2 January 2021).

¹⁸⁴ UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia (September 2011–June 2016), supra fn 162, §2. Although the FARC-EP was mostly listed for the use and recruitment of children, in certain annual reports, such as those of 2006 and 2009, it is stated that '[t]his party has also been responsible for abductions and committing rape and other grave sexual violence against children in the reporting period'. See UNGA/UNSC, Children and Armed Conflict: Report of the Secretary-General, supra fn 162, p 32; UNGA/UNSC, Children and Armed Conflict: Report of the Secretary-General, UN doc A/63/785–S/2009/158, 26 March 2009, p 51. For further information about the framework created by the UN to address the situation of children affected by armed conflict, see UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, <https://childrenandarmedconflict.un.org/> (last accessed 2 January 2021).

murder and torture.¹⁸⁵ Additional reports suggest that the FARC-EP would recruit children in hostilities in order to compensate for the loss of troops caused by desertion and deaths in combat,¹⁸⁶ and that the group would organize meetings with peasant communities, asking them to ‘present their children to serve in the military of the “People’s Army”’.¹⁸⁷ It would also resort to promises, ideological persuasion, pressure and sometimes intimidation.¹⁸⁸

According to the former commander Marcos Calarcá, however, the group ‘under no circumstance recruited children, or anyone else, forcefully’ and the reports about this issue were propaganda to ‘delegitimize’ the guerrillas.¹⁸⁹ While giving a public interview, Pastor Alape – another former commander and member of the Secretariat – argued nonetheless that although the internal rules prohibited it, ‘how can you tell a 13-year-old girl who is mistreated by her father or who is raped by someone, that you cannot take her with you? Isn’t it better to be with the guerrilla?’¹⁹⁰ Alape further explained that due to the conditions of poverty and the lack of assistance provided to children within their communities, and the fact that large numbers were orphans as a consequence of the different massacres, their demobilization was a difficult process.¹⁹¹

Yet the peace negotiations between the government and the FARC-EP triggered a policy change regarding the situation of children. In February 2015, the group committed to end the recruitment of children under 17 years old, and

raised the minimum age to 18 years in November 2015, thus going beyond their IHL obligations. It affirmed:

Therefore, the FARC-EP, besides considering the need to provide clear measures of de-escalation of the conflict to accelerate progress towards peace, announce to the country and to the world, taking into account the Optional Protocol of 2000, today an Appendix of the Convention on the Rights of the Child, decide not to incorporate, from now on, minors under age of 17 in the guerrilla ranks.¹⁹²

As a consequence, a significant development took place in May 2016 when the Government of Colombia and the FARC-EP announced an agreement on the separation of children under 15 years of age from the armed group, the parties’ commitment to develop a road map for the separation of all children as well as a special comprehensive reintegration programme for these children.¹⁹³ Further steps were included in the 2016 Peace Agreement, in which the parties decided that in ‘the implementation of everything agreed, the best interests of children and adolescents will be guaranteed, as well as their rights and their prevalence over the rights of everyone else’.¹⁹⁴ They also established that in no case would an amnesty or pardon be provided

¹⁸⁵ UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia (September 2011–June 2016), supra fn 162, §20. Here, the UN describes the case of a child who was recruited by the FARC-EP at the age of 12, and who was ‘forced to kill and torture several of his friends’.

¹⁸⁶ ‘Las Farc aumentan el reclutamiento de menores para sustituir desertores’, *El Tiempo*, 8 June 2009, <https://www.eltiempo.com/archivo/documento/CMS-5599854>.

¹⁸⁷ Aguilera Peña, *Guerrilla y población civil*, supra fn 16, p 307.

¹⁸⁸ Ibid.

¹⁸⁹ Vivanco, ‘El falso relato de las Farc sobre el reclutamiento infantil’, supra fn 156.

¹⁹⁰ D. Beriain, ‘En la guarida de las FARC con Pastor Alape, su nuevo jefe militar’, *ABC Internacional*, 10 October 2010,

https://www.abc.es/internacional/entrevista-pastor-alape-jefe-201010100000_noticia.html.

¹⁹¹ ‘Habla “Alape”, el guerrillero de la foto con Alzate’, *La Opinión*, 28 December 2014, <https://www.laopinion.com.co/habla-alape-el-guerrillero-de-la-foto-con-alzate>.

¹⁹² FARC-EP, Announcement on Minors in the Conflict, supra fn 177. See also UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia (September 2011–June 2016), supra fn 162, §19.

¹⁹³ UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia (September 2011–June 2016), supra fn 162, §13.

¹⁹⁴ Art 6.1.3, 2016 Peace Agreement, supra fn 166.

for the recruitment of minors during the conflict, ‘as provided for in the Rome Statute’.¹⁹⁵

D. PROTECTION OF EDUCATION

Under customary IHL,¹⁹⁶ children affected by armed conflict are entitled to respect and protection. This includes notably access to education, food and health care. Under Article 4(3)(a) of AP II, children shall be provided with the care and aid they require, and in particular ‘they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care’. In addition, schools are considered to be civilian objects and are thus protected against attacks, unless they are used for military purposes and become lawful military objectives. Under the principle of precaution, parties to armed conflict, including ANSAs must take constant care, in the conduct of military operations, to spare civilian objects, including schools. In addition, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to schools. In light of this principle, the use of functioning schools for military purposes must be avoided except it is done for imperative military reasons.¹⁹⁷

There are various public documents by the FARC-EP related to the protection and provision

of education. Some of them are general in nature. For instance, in a 2005 communiqué, the group affirmed that one of its goals was to achieve ‘efficient and free health and education services by the State’.¹⁹⁸ In a 2007 communiqué, the FARC-EP noted that it would work ‘for free education at all levels’.¹⁹⁹ In a 2013 document, it went further by making explicit proposals in the areas of ‘education, science and technology’. The first point of this communiqué, entitled ‘Universal and free basic and secondary education for children and youth’, states that:

A special education programme for the countryside will be undertaken immediately, with the aim of eradicating illiteracy, guaranteeing universal and free basic and secondary education for children and young people in the countryside. Free education is understood to mean the provision of comprehensive conditions to guarantee access to and permanence in school, including school supplies and books, uniforms, transportation and food.²⁰⁰

When inquired about the provision of education in areas controlled or under the influence of the FARC-EP, a scholar explained that the Colombian Government was always in charge of paying the teachers’ salaries and

¹⁹⁵ Ibid, Appendix I, Law on Amnesty, Pardon and Special Criminal Treatment, Art 22.

¹⁹⁶ Rule 135, ICRC CIHL Database, *supra* fn 94.

¹⁹⁷ Rules 7 and 15, *ibid*. See also Global Coalition to Protect Education from Attack (GCPEA), Guidelines for Protecting Schools and Universities From Military Use During Armed Conflict, http://protectingeducation.org/wp-content/uploads/documents/documents_guidelines_en.pdf (last accessed 2 January 2021): ‘Guideline 1: Functioning schools and universities should not be used by the fighting forces of parties to armed conflict in anyway in support of the military effort. (a) This principle extends to schools and universities that are temporarily closed outside normal class hours, during weekends and holidays, and during vacation periods. (b) Parties to armed conflict should neither use force nor offer incentives to education administrators to evacuate schools and universities in order that they can be made available for use in support of the military effort.’ The Guidelines as well as the Safe Schools

Declaration are non-binding instruments through which a number of states have expressed political support for and a commitment to protecting education in armed conflict. See GCPEA, ‘Safe Schools Declaration and Guidelines on Military Use’, <https://protectingeducation.org/gcpea-publications/safe-schools-declaration-and-guidelines-on-military-use/> (last accessed 2 January 2021).

¹⁹⁸ FARC-EP, ‘Las FARC-EP saludan a las mujeres’, 8 March 2005, <http://cedema.org/ver.php?id=865> (last accessed 2 January 2021).

¹⁹⁹ FARC-EP, Manifiesto de las FARC, 30 September 2007, Para 5, <http://cedema.org/ver.php?id=2229> (last accessed 2 January 2021).

²⁰⁰ FARC-EP, Seis propuestas mínimas de educación, ciencia y tecnología para la transformación democrática del campo, 21 March 2012, Para 1, <http://cedema.org/ver.php?id=5528> (last accessed 2 January 2020).

building the necessary infrastructure.²⁰¹ The ‘predominant pedagogical model’, he claimed, is the ‘state’s pedagogical model’. The group, however, would exert a certain influence over teachers, but without necessarily affecting the curricula or the provision of education as such. He added that although the FARC-EP would normally be respectful of teachers, they would be ‘less respectful of the paramilitary ones’.²⁰² This scholar also noted that, to his knowledge, the FARC-EP had never used an educational facility for military purposes.

Yet there have been reports of the group affecting the provision of education in different ways. The 2016 UN Secretary-General’s annual report on children and armed conflict confirmed that ‘allegations of threats against teachers by FARC-EP’ were received.²⁰³ The report also states that there was one case of military use of schools by this group.²⁰⁴ In 2015, the UN Secretary-General reported that the Colombian armed forces had found ‘76 gas cylinders stored by the FARC-EP in a school in Cauca, ready to be used in combat, thereby putting’ the building and the children therein at risk.²⁰⁵ Previous cases include the killing of two teachers in Cauca in 2010, ‘allegedly by members of the FARC-EP’, leading to the displacement of other teachers in the area, ‘leaving 320 children without access to education’.²⁰⁶

The provision and protection of education were included in the 2016 Peace Agreement. There, it is noted that the ‘National Government is to set up and implement the Special Rural Education Plan (Plan Especial de Educación Rural)’. This plan would aim to deliver, among other things, ‘[u]niversal coverage with comprehensive service provision for early childhood’, ‘[f]lexible pre-school, primary and

secondary school education adapted to the needs of communities and of the rural environment, with an equity-based approach’, and the improvement of ‘the conditions of access of boys, girls and adolescents to the education system and assistance in enabling them to continue their education, through the provision of free access to materials, textbooks, school meals and transport’.²⁰⁷

E. HUMANITARIAN ACCESS

Common Article 3, Paragraph 2 of the 1949 Geneva Conventions provides that ‘an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict’. This provision has been considered to be one of the legal bases on which humanitarian organisations, other than the ICRC, may provide humanitarian relief and protection to people in need. Under customary IHL, the parties to an armed conflict ‘must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’.²⁰⁸ Humanitarian relief personnel and objects must be respected and protected.²⁰⁹

The FARC-EP dealt with the issue of humanitarian access in various ways. In *Beligerancia*, for instance, it affirmed that in conflict zones, ‘humanitarian organizations must travel with clearly visible signs and at a minimum speed’.²¹⁰ When asked who was considered to be a ‘humanitarian actor’, the FARC-EP affirmed, in an exchange with Geneva Call, that ‘State’s armed forces, dissidents and

²⁰¹ Interview with Professor Carlos Medina Gallego, 2 July 2019. It has been reported, however, that the FARC-EP paid teachers in the 1980s in certain regions, such as in the Caguán. See Aguilera Peña, *Guerrilla y población civil*, supra fn 16, p 158.

²⁰² *Ibid.*

²⁰³ UNGA/UNSC, Children and Armed Conflict: Report of the Secretary-General, UN doc A/70/836-S/2016/360, 20 April 2016, §181.

²⁰⁴ *Ibid.*

²⁰⁵ UNGA/UNSC, Children and Armed Conflict: Report of the Secretary-General, UN doc A/69/926-S/2015/409, 5 June 2015, §222.

²⁰⁶ UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia, 2012, supra fn 14, §41.

²⁰⁷ Art. 1.3.2.2, 2016 Peace Agreement, supra fn 166.

²⁰⁸ Rule 55, ICRC CIHL Database, supra fn 94.

²⁰⁹ Rules 31 and 32, *ibid.*

²¹⁰ FARC-EP, *Beligerancia*, supra fn 34, p 10.

civilian organizations are humanitarian actors, as they are in a position and obligation to assist the victims of natural disasters and other emergencies (including armed conflicts), in accordance with the principles of humanity, impartiality and neutrality'.²¹¹ Yet, according to the group, the 'State has the first and primary responsibility for victims, being in charge of the initiation, organization, coordination and delivery of humanitarian assistance'.²¹²

When asked for the FARC-EP's interpretation of the notion of 'humanitarian action', former members affirmed that this

involves a set of actions and processes to help victims of disasters (triggered by natural disasters or armed conflicts), aimed at alleviating their suffering, ensuring their livelihoods, protecting their fundamental rights and defending their dignity, as well as, sometimes, to slow down the process of socio-economic disruption of the community and prepare them for natural disasters. It includes what is known as humanitarian aid, but its content is broader than that. It includes not only the provision of basic goods and services for subsistence but also, especially in conflict situations, the protection of victims and their fundamental rights through work such as the defence of human rights, testimony, denunciation, political pressure and accompaniment.²¹³

In addition, the group explained that '[w]hile there are humanitarian actors that must be neutral, such as the ICRC; not necessarily all humanitarian actors must be impartial'. In this statement the FARC-EP seems to equate the principles of impartiality and neutrality. In any case, according to the group, these actors 'are all

called upon to provide humanitarian assistance and general protection of human dignity'.²¹⁴ Neutrality, in this context, would imply that the actor is not 'taking sides in hostilities and not becoming involved at any time in controversies of political, racial, religious or ideological nature'.²¹⁵ Exchanges also dealt with the principle of impartiality: '[t]his is a principle', the FARC-EP pointed out, 'that all humanitarian actors must abide by, in the sense that humanitarian assistance should be provided to all who need it without the provider being based on nationality, race, religion or political views. It must be based on need alone. The protection of human dignity is general and not particular'.²¹⁶

Regarding the principle of independence, the group has noted that although this is 'the duty of humanitarian actors', in practice 'such independence is a fallacy in which the political and economic interests that guide any human action are hidden'. This is how humanitarian actors 'would like to be', but they are 'conditioned by the political contexts in which they arise, their sources of funding, the degree of their relationship with the authorities', among other things.²¹⁷

During the interviews, a former commander of the FARC-EP and member of the Secretariat explained that these institutions would normally not 'show up' in the territories under the control or influence of the group, but if they did, they would be granted access. In fact, he remembered a case in which the ICRC had assisted the FARC-EP by providing health care to some members who had been seriously injured. He also referred to a case involving health brigades from the government assisting with malaria, who were seemingly wrongly executed by the FARC-EP without any investigation because a commander believed that they were

²¹¹ Information included in this section is based on exchanges between Geneva Call and the FARC-EP in the context of the drafting of a public report on ANSAs and humanitarian action. See Geneva Call, *In Their Words: Perceptions of Armed Non-State Actors on Humanitarian Action*, 2016, https://www.genevacall.org/wp-content/uploads/dlm_uploads/2016/09/WHS_Report_2016_web.pdf (last accessed 1 January 2021).

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

intelligence agents.²¹⁸ He further added that the *malaria*s (individuals assisting with the treatment of malaria) had behaved ‘very bad for many years with us. Because they were intelligence agents’.²¹⁹ Although there are no FARC-EP’s rules ‘defining criteria or conditions for allowing humanitarian access’, the politico-military structures, it is said, ‘are guided by the existing rules of IHL in this area’, while at the same time trying to avoid infiltration or espionage by the enemy’.²²⁰ In another exchange with Geneva Call, former representatives of the FARC-EP noted that attacking humanitarian workers would be ‘the last resort’, and this would occur because they would be ‘in the company of enemy military personnel’. Yet much information would be needed to corroborate this before the attack took place.²²¹ It is interesting to note that based on the interviews conducted for this case study, the former commanders did not seem to consider that group had an obligation to provide any form of humanitarian aid.

There are certain public reports dealing with humanitarian access and the FARC-EP that deserve to be noted. In July 2011, for instance, the group declared a UN humanitarian aid programme in the department of Nariño to be a counter-insurgency initiative associated with a governmental programme that had been declared as a military target.²²² The UN Secretary-General reported in 2012 that the ‘*paros armados* (armed strikes)’ imposed by the FARC-EP prohibited free movement of goods and people, resulting in the isolation of several municipalities without access to humanitarian assistance and basic services. In October 2009, for instance, a strike imposed by the ANSA caused the complete suspension of land transport in Arauca, which ‘halted the delivery of food by a humanitarian organization’.²²³

²¹⁸ Interview with former commander of the FARC-EP, 6 July 2019.

²¹⁹ *Ibid.*

²²⁰ Information included in this section is based on exchanges between Geneva Call and the FARC-EP in the context of the drafting of a public report on ANSAs and humanitarian action. See Geneva Call, *In Their Words*, supra fn 211.

²²¹ *Ibid.*

F. PROTECTION OF HEALTH CARE

Under common Article 3(2) of the 1949 Geneva Conventions, the ‘wounded and sick’ shall be collected and cared for. As stipulated in Article 7 of AP II applicable to the conflict between the FARC-EP and the Colombian Government – at least since the ratification of the treaty by the latter in 1995 – ‘[i]n all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones’.

Medical personnel, facilities and transports that are exclusively assigned to medical purposes must be respected and protected in all circumstances, although they lose such protection if they carry out or are used to commit acts harmful to the enemy.²²⁴ Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited.²²⁵

The protection and provision of health care is dealt with by the FARC-EP in different documents. *Beligerancia*, for instance, describes a commitment of the group to give detainees ‘a humane, dignified and respectful treatment, which logically includes the necessary medical assistance’.²²⁶ The Statute of the ANSA, in addition, notes that

[i]n case of illness of comrades, whether in the barracks camps or guerrilla posts, each unit must look after them and if the unit to which the sick person belongs to is not on the spot, the care of the sick

²²² UN Security Council, Report of the Secretary-General on Children and Armed Conflict in Colombia, 2012, supra fn 14, §46.

²²³ *Ibid.*, §48.

²²⁴ Rules 25, 28 and 29, ICRC CIHL Database, supra fn 94.

²²⁵ Rule 30, *ibid.*

²²⁶ FARC-EP, *Beligerancia*, supra fn 34, p 13.

person falls to those in charge of the post, barracks or camp. If it is proven that the sick person has been abandoned, the corresponding person or persons will be sanctioned.²²⁷

During the Eighth National Guerrilla Conference of 1993, the group described some of its internal health-care policies with respect to provision:

Our health policy at this time will be fundamentally oriented towards solving our health, clinical, wound and disease problems with our own resources and in our areas, avoiding as much as possible having to take sick people out to the cities, putting their safety and that of the organization at serious risk. In special cases, authorization will be requested from the management of the Blocs and the Secretariat.

The Bloc Command Structures and the Secretariat will assume the task of setting up the clandestine Fariana clinics.²²⁸

When asked about this, a former commander of the group explained that the provision of health care to the wounded and sick, be they civilians, enemy forces or FARC-EP members, 'was a priority'.²²⁹ Another former member explained that 'whoever was proved to have not given care to a sick or injured person, for whatever reason, was punished'.²³⁰ He added that

'[m]any people came to our camp looking for medicine. People living in a difficult financial situation, those with malaria, the wounded, those women who had to give birth, they would all come to see us. The guerrilla had a social duty to help them ... Humanism was always really present among us'.²³¹ Reports by Colombia's National Center for Historical Memory also refer to the health campaigns carried out by the group,²³² and there are even reports on a FARC-EP dental laboratory, containing different tools, medicines and vaccines.²³³ It has also been stated that individuals fulfilling these medical roles were either permanent members of the FARC-EP or, on occasion, were hired for specific activities. They would not wear the red cross emblem.²³⁴ Interestingly, in 2019, 181 former members of this ANSA who were working as doctors and nurses in the context of the conflict were officially certified by the Colombian Agency for Reincorporation and Normalization.²³⁵

In 2001, HRW expressed its concern about the group's 'continuing attacks on medical workers and health facilities, including ambulances'.²³⁶ It accused the group to have conducted an attack against an ambulance that was carrying a pregnant woman 'in urgent need of medical care'. The FARC-EP stopped the ambulance, forcing 'the pregnant woman and her nurse to get out, and then burnt the vehicle'. Authorities at the village's hospital also reported that the group 'had threatened to bomb the building, supposedly to protest the fact that medical professionals there [were treating] individuals who may [have been] paramilitaries'.²³⁷ Other cases of the FARC-EP

²²⁷ FARC-EP, Estatuto, p 46.

²²⁸ FARC-EP, Octava Conferencia Nacional de Guerrillero, 23 de mayo – 3 de abril 1993.

²²⁹ Interview with former commander of the FARC-EP, 6 July 2019.

²³⁰ Interview with former commander of the FARC-EP, 6 July 2019.

²³¹ Ibid.

²³² Aguilera Peña, *Guerrilla y población civil*, supra fn 16, p 158.

²³³ 'Ejército desmantela laboratorio odontológico de las Farc', *El Espectador*, 29 June 2012, [https://www.elespectador.com/noticias/judicial/ejercito-](https://www.elespectador.com/noticias/judicial/ejercito-desmantela-laboratorio-odontologico-de-las-farc/)

[desmantela-laboratorio-odontologico-de-las-farc/](https://www.lespectador.com/noticias/judicial/ejercito-desmantela-laboratorio-odontologico-de-las-farc/) (last accessed 1 January 2021).

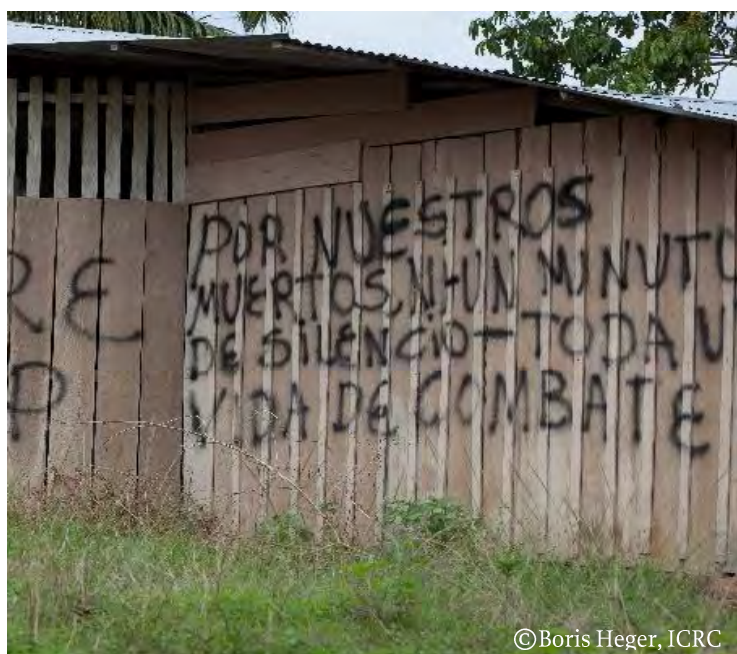
²³⁴ Interview with Professor Carlos Medina Gallego, 2 July 2019.

²³⁵ Agencia para la Reincorporación y la Normalización, 'Exintegrantes de las Farc-Ep validaron sus saberes previos como auxiliares de enfermería', 22 October 2019, <http://www.reincorporacion.gov.co/es/sala-de-prensa/noticias/Paginas/2019/Mas-de-180-exintegrantes-de-las-Farc-Ep-validaron-sus-saberes-previos-como-auxiliares-de-enfermeria.aspx> (last accessed 2 January 2021).

²³⁶ HRW, *Colombia: Beyond Negotiation*, supra fn 60, p 14.

²³⁷ Ibid, p 15.

attacking health-care transport have been reported, including against a military ambulance.²³⁸ The UN Secretary-General, for instance, has also dealt with this issue, reporting that in May 2009, in a rural area of the North Santander, the group attacked an ambulance carrying an injured man, resulting in the suspension of medical care in that area.²³⁹ Similarly, in June 2011, the health-care personnel of an international NGO were detained for two days by the FARC-EP during a mission with indigenous communities.²⁴⁰ HRW, in the abovementioned 2001 report, also shared its concern with respect to the denial of medical attention to ‘captured combatants’.²⁴¹



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G. THE PROHIBITION OF FORCED DISPLACEMENT

IHL prohibits the forced displacement of civilians ‘unless the security of the civilians is involved or imperative military reasons so demand’.²⁴² It also provides that in case of displacement, all possible measures shall be taken to ensure that the displaced persons are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated.²⁴³ Displaced persons have a right to return to their homes as soon as the reason for their displacement ceases to exist and security allows.²⁴⁴

Broadly, the FARC-EP’s internal regulations appear not to make any direct reference to the regulation of forced displacement.²⁴⁵ Yet certain practices have been documented with respect to this theme. For instance, David Cantor writes that the group had ‘even sought out rural populations displaced in urban centres and either encouraged them or, in some instances, ordered them to return’.²⁴⁶ This approach, according to him, was ‘consistent with its political rationale as a protector of peasant interests as well as humanitarian concerns but is also supported by military considerations’.²⁴⁷ Cantor further explains that the strategic benefits of knowing those civilians living in the territories controlled by the group often appeared to ‘outweigh the attendant risks’.²⁴⁸

It has also been reported that the FARC-EP had nonetheless prevented or controlled the return of displaced people ‘where suspicion of collaboration with the State or associated para-

²³⁸ ‘Colombia denunciará a las Farc ante la ONU y la OEA por ataque a ambulancia militar’, *El Tiempo*, 15 April 2008, <https://www.eltiempo.com/archivo/documento/CMS-4101031>.

²³⁹ UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia, 2012, supra fn 14, §44.

²⁴⁰ Ibid.

²⁴¹ HRW, *Colombia: Beyond Negotiation*, supra fn 60, p 11.

²⁴² Art 17, AP II; Rule 129, ICRC CIHL Database, supra fn 94.

²⁴³ Rule 131, ICRC CIHL Database, supra fn 94.

²⁴⁴ Rule 132, *ibid*.

²⁴⁵ D. J. Cantor, ‘The Colombian Guerrilla, Forced Displacement and Return’, *Forced Migration Review* 37 (2011) 21, <https://search.proquest.com/openview/80036ba01fb47969f8e5c5457dc2dc29/1?pq-origsite=gscholar&cbl=55113> (last accessed 2 January 2021).

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

military groups existed'.²⁴⁹ Individuals, it is pointed out, had to seek permission 'to return and, if allowed, they were able to do so under specific conditions resulting in further restrictions on their movements'.²⁵⁰ Various stakeholders have also highlighted that the FARC-EP would have encouraged certain displacements, such as those of individuals considered to be supporters of paramilitaries and those who would not pay taxes.

According to a study by the Prosecutor General's Office, focused specifically on the FARC's Eastern Bloc, 324,596 people from 82,707 homes were displaced between 1997 and 2011 in what the study describes as 'an explicit policy'.²⁵¹ In the first six years of the presidency of Alvaro Uribe, about 257,000 Colombians were displaced by the Eastern Bloc of the FARC-EP, most of them in the regions of Meta, Arauca and Cundinamarca. The Prosecutor General also reported that in Arauca, between 1997 and 2011, 60,400 people were expelled; in Meta, 114,269; in Guaviare, 42,421 and in Vichada, 10,407.²⁵² The Office of the ICC Prosecutor has provided certain explanations as to why the FARC (and also the ELN and paramilitary groups) have caused forced displacement, including 'the expansion of their strategic military presence, securing access routes, and establishing zones of political influence. Colombians [were] also forced to flee as a result of threats and attacks, including assassinations of community leaders, by armed groups which suspect them of supporting the other side'.²⁵³

²⁴⁹ Geneva Call, *Armed Non-State Actors and Displacement in Armed Conflict*, October 2013, p 10, <https://www.genevacall.org/wp-content/uploads/2019/02/Armed-non-State-actors-and-displacement-in-armed-conflict1.pdf> (last accessed 2 January 2021).

²⁵⁰ *Ibid*, p 10.

²⁵¹ C. De Rivaz, 'Displacement of Persons Is "Explicit Policy" of FARC: Report', *Colombia Reports*, 25 September 2013, <https://colombiareports.com/displacement-persons-explicit-policy-farc-report/> (last accessed 2 January 2021).

²⁵² J. D. Laverde Palma, 'Las Farc y su política de desplazamiento', *El Espectador*, 24 September 2013, <https://www.elespectador.com/noticias/judicial/las-farc-y-su-politica-de-desplazamiento/>.

H. USE OF LANDMINES AND OTHER EXPLOSIVE DEVICES

The use of landmines – both anti-personnel (AP) and anti-vehicle (AV) is not prohibited per se under customary IHL. However, when landmines are used, particular care must be taken to minimize their indiscriminate effects.²⁵⁴ In addition, parties to the conflict using landmines must record their placement, as far as possible.²⁵⁵ At the end of active hostilities, they must also remove or otherwise render them harmless to civilians or facilitate their removal.²⁵⁶ Although the elimination of AP landmines is not considered customary law yet, more than three-quarters of states today are parties to the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

Different FARC-EP documents refer to its mine use policy. In 2009, the group affirmed in a public communiqué on this issue that as a 'political-military organization, [it] placed mines in combat zones, making the most of each ammunition', and that it was not true that it put 'explosives near the population'.²⁵⁷ Landmines would be used 'to stop the advance of enemy operations', as the group knew that these were 'the only factor that stop[ped] and intimidate[d] them',²⁵⁸ but also to protect the cultivation of coca leaves. The use of these weapons has also

²⁵³ ICC, OTP, Situation in Colombia, *supra* fn 129, §61.

²⁵⁴ Rule 81, ICRC CIHL Database, *supra* fn 94.

²⁵⁵ Rule 82, *ibid*.

²⁵⁶ Rule 83, *ibid*.

²⁵⁷ FARC-EP, Comunicado relativo a minas y otras falacias, p 2, http://theirwords.org/media/transfer/doc/co_farc_ep_2009_29-9622a44c77645b9cfab8fdea9960234f.pdf (last accessed 2 January 2021).

²⁵⁸ Document referred to in FARC-EP, De Alfonso Cano a camaradas del Secretariado, 16 August 2008, cited by Aguilera Peña, 'Claves y distorsiones del régimen disciplinario guerrillero', *supra* fn 35, fn 454. Also cited in Campaña Colombiana Contra Minas, *Monitor de minas terrestres: Colombia 2009*, p 31,

been included in a booklet dealing with ambushes.²⁵⁹

When questioned about this humanitarian issue, a former commander of the group stated that the use of AP landmines was ‘to slow the advance of enemy forces that was carried out on a large scale’,²⁶⁰ but not as a policy and not with the goal of mining schools and corridors used by civilians, as the group was aware of the conflict that this would create with the civilian population at a later stage.²⁶¹ Moreover, she also affirmed that ‘in order to have highly sophisticated weaponry, you need immense financial power, just as a state has, and the FARC-EP did not have that financial power. So, the truth is that the use of landmines was related to the dynamics of the conflict, which made people rely on the resources they had at hand’.²⁶² There was a moment, however, in which the FARC-EP

began to question, think and worry because those mines that [the group was using] to slow the passage of enemy forces were also affecting the non-combatant civilian population. While certain communities understood that the mines were not targeting them, but were part of the dynamic of the conflict, others did not, rejecting the use of these devices because of the damage they were causing.²⁶³

In terms of dealing with the use of these landmines in populated areas, another former commander added that

when they were placed near a community, generally the members of

that same community were informed that a specific area was contaminated with mines, to prevent them from passing through there. But it turns out that the peasants are careless and, in their work, they take shortcuts, often being affected by the artifacts. Yet on many occasions they were informed that the areas were contaminated. Other times, landmines were placed on a road during the confrontation to slow the advance of the enemy.²⁶⁴

The same individual added that there were also challenges with the removal of the landmines, which would be carried out by the fighter who had planted them, following a map. When the landmines were not ‘removed quickly enough, accidents affecting the non-combatant civilian population’ could take place.²⁶⁵ Interestingly, there were also cases of ‘spontaneous’ mine clearance activities by the FARC-EP.²⁶⁶ A previous study by Geneva Call found examples in which the group had cleared certain indigenous community areas in the department of Cauca, at the request of the population.²⁶⁷ Similar examples can be found in other regions of Colombia, such as in Cocorná, San Luis and Granada, all of them part of the department of Antioquia, and in India, belonging to the Magdalena Medio. In addition, the group reportedly cooperated in facilitating a development project by indicating where landmines had been placed.²⁶⁸

Reports on the indiscriminate use of landmines and improvised explosive devices (IEDs) by the FARC-EP are numerous, in particular since the breakdown of the peace

<https://colombiasinminas.org/wp-content/uploads/2010/12/23944435-Monitor-de-Minas-Terrestres-2009.pdf> (last accessed 2 January 2021).

²⁵⁹ This information was found on the FARC-EP website, which is no longer available at the time of this case study’s publication.

²⁶⁰ Interview with former female commander of the FARC-EP, 1 July 2019.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Interview with former female commander of the FARC-EP, 1 July 2019.

²⁶⁵ Ibid.

²⁶⁶ Geneva Call, *Armed Non-State Actors and Landmines, Volume II: A Global Report of NSA Mine Action*, 2006, p 90, https://www.files.ethz.ch/isn/29258/2006_November.pdf (last accessed 2 January 2021).

²⁶⁷ Ibid.

²⁶⁸ Ibid, p 91.

negotiations in 2002.²⁶⁹ Allegedly, the military pressure on the FARC-EP during the Uribe government (2002–2010) caused the group to increasingly resort to landmines to hinder army advances, and leave mines in the fields that it should have had cleared before moving ahead.²⁷⁰ While between 1998 and 2002, 1,184 cases of the use of landmines were reported, between 2003 and 2008 the number went up to 5,896.²⁷¹ In 2008, Amnesty International further stated that the FARC-EP had used low-precision weapons, such as gas cylinder mortars, car bombs, booby traps and other IEDs in areas primarily used by civilians. Although they were not the intended targets, civilians had ‘often been the main victims of these attacks’.²⁷² Similarly, in a 2012 report the UN Secretary-General described how in 2009 the FARC-EP had mined ‘an area within 300 meters of a school, putting at risk 50 schoolchildren and their community’.²⁷³ In 2010, the same document affirms, ‘an area surrounding a school had allegedly been mined because a polling station had been set up inside it’ and, in 2011, the FARC-EP had ‘used a school as a shield in order to attack Colombian military forces and left a minefield that forced the suspension of classes for over six months’.²⁷⁴ The *Landmine Monitor Report* has also included the FARC-EP among the biggest users of AP landmines in the world between 2005 and 2014.²⁷⁵

²⁶⁹ Sjöberg, ‘Challengers Without Responsibility?’, supra fn 41, p 232.

²⁷⁰ This information was obtained in an interview with Geneva Call staff members in 2007. HRW has stated, however, that this increased landmine use began in 2000. HRW, *Maiming the People: Guerrilla Use of Antipersonnel Landmines and Other Indiscriminate Weapons in Colombia*, 2007, <https://www.hrw.org/reports/2007/colombia0707/index.htm> (last accessed 2 January 2021).

²⁷¹ Aguilera Peña, *Guerrilla y población civil*, supra fn 16, p 222.

²⁷² Amnesty International, ‘*Leave Us in Peace*’, supra fn 13, p 42.

²⁷³ UNSC, Report of the Secretary-General on Children and Armed Conflict in Colombia, 2012, supra fn 14, §42.

²⁷⁴ Ibid.

²⁷⁵ See, e.g., International Campaign to Ban Landmines, *Landmine Monitor Report 2006: Toward a Mine-Free World: Executive Summary*, p 16, [http://www.the-](http://www.the-monitor.org/media/1682283/Exec-Summary-2006.pdf)

March 2015 marked a turning point in the number of victims affected by landmines in Colombia. Within the framework of the peace talks the abovementioned mine clearance agreement was concluded.²⁷⁶ The document includes provisions related to the selection of sites, cleaning and clearance, dialogues with communities, the formal delivery of the cleared lands to national and local authorities and communities, as well as a commitment ‘to keep the areas clean and cleared, in order to provide guarantees of non-repetition to the communities’.²⁷⁷ It has been reported that between the second half of 2015 and through 2016 the use of victim-activated devices dramatically dropped.²⁷⁸

Through the 2016 Peace Agreement, the FARC-EP also committed to ‘the supply of information, with the clearing and decontamination of areas where there are anti-personnel mines (APMs), improvised explosive devices (IEDs), and unexploded ordnance (UXO) or explosive remnants of war (ERW) in general’, prioritizing places ‘the population has greater risk of being affected by the presence of APMs, IEDs and UXO or ERWs’.²⁷⁹ The Agreement also envisages the reincorporation of FARC-EP’s members into civilian life.²⁸⁰

[monitor.org/media/1682283/Exec-Summary-2006.pdf](http://www.the-monitor.org/media/1682283/Exec-Summary-2006.pdf) (last accessed 2 January 2021); International Campaign to Ban Landmines, *Landmine Monitor 2014*, p 8, <http://www.the-monitor.org/media/1716915/Landmine-Monitor-2014-Web.pdf> (last accessed 2 January 2021).

²⁷⁶ Acuerdo sobre limpieza y descontaminación del territorio de la presencia de minas antipersonal (MAP), artefactos explosivos improvisados (AEI) y municiones sin explotar (MUSE) o restos explosivos de guerra (REG) en general, 7 March 2015, <http://cedema.org/ver.php?id=6656>.

²⁷⁷ Ibid.

²⁷⁸ Landmine & Cluster Munition Monitor, ‘Columbia Mine Ban Policy’, last updated 16 November 2016, <http://www.the-monitor.org/en-gb/reports/2016/colombia/mine-ban-policy.aspx> (last accessed 2 January 2021).

²⁷⁹ Ibid.

²⁸⁰ 2016 Peace Agreement, supra fn 166, p 68.

I. DETENTION, FAIR TRIAL AND ADMINISTRATION OF JUSTICE

1. TREATMENT OF PERSONS IN DETENTION

Common Article 3 of the 1949 Geneva Conventions, Articles 4 and 5 of AP II, as well as customary IHL provide numerous rules concerning the treatment of persons in detention, notably the prohibition of ill-treatment, the provision of food and water and of safeguards with regards to health and hygiene. Generally, persons deprived of their liberty are ‘entitled to respect for their person, honour and convictions and religious practice’ and ‘shall in all circumstances be treated humanely, without any adverse distinction’.²⁸¹ ICRC access to persons deprived of their liberty is mandatory only in the context of international armed conflicts and, as such, is not an obligation for ANSAs. In the context of a NIAC, and according to common Article 3, the ICRC ‘may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families’.²⁸² According to the ICRC Customary Study, persons deprived of their liberty in relation to a NIAC must be released as soon as the reasons for their detention cease to exist.

Different internal documents of the FARC-EP refer to the protection of detainees. Its Statute, for instance, indicates that among the duties of the fighters is the duty to ‘[r]espect the prisoners of

war in their physical integrity and convictions’.²⁸³ In a 2008 call addressed to governmental forces, the FARC-EP repeated their commitment to the ‘full respect for the physical and moral integrity of any military who becomes a prisoner in combat’.²⁸⁴ It must be noted, in any case, that the group did not have detention facilities, but designated areas for custody.²⁸⁵

The inclusion of safeguards protecting detainees in the Statute was discussed during the interviews with the former representatives of the FARC-EP. A former commander of the group and member of the Secretariat stated that ‘any human group, no matter how small it is, adopts rules’, which may be written or not. ‘As an armed group’, he added, ‘we had to have rules. And it was what we faced on the ground that forced us to adopt written rules and include them in a Statute’.²⁸⁶ An example of this can be seen in the adoption of norms related to the protection of detainees:

When we started to have prisoners of war ... when we captured people during combats, which was rare at the beginning of the war and when that was the case, the time of their captivity was short. I remember some we had detained only for 2 days, 13 soldiers – we had them for three days and then we released them. But we were facing this situation and then the need to regulate it begins, and this is why a standard of respect for the

²⁸¹ Art 4, AP II.

²⁸² Rule 124, ICRC CIHL Database, supra fn 94.

²⁸³ FARC-EP, Estatuto, Art 7(k).

²⁸⁴ FARC-EP, Llamamiento a soldados, policias, oficiales y suboficiales patriotas, Art 6, June 2008, http://theirwords.org/media/transfer/doc/co_farc_ep_2008_27-8b16a93822a796330696bf384d93175b.pdf (last accessed 2 January 2021).

²⁸⁵ The JEP has noted, in this sense, that although the mobile nature of the FARC-EP required its units ‘to be in constant movement’, during some periods and in some areas of the country (and also abroad, including in Venezuela), the

group had ‘facilities’ at which its members stayed for longer periods of time. There, the JEP notes, the FARC-EP held groups of civilian hostages and members of the governmental forces in certain ‘prisons’, as the group’s members used to call these facilities. *Caso No. 01 Toma de rehenes y graves privaciones de la libertad cometidas por las FARC-EP*, Jurisdicción Especial para la Paz. Salas de Justicia. Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, January 2021, p. 75.

²⁸⁶ Interview with former commander of the FARC-EP, 6 July 2019.

physical and moral integrity of prisoners of war was established.²⁸⁷

When asked about the FARC-EP's practices regarding detention, a former member of the group affirmed, in line with what was said before, that at the beginning they would detain individuals only in the context of the conduct of hostilities – they would be deprived of their liberty because ‘they were in an armed confrontation, and in a confrontation one fighter captures the other who has surrendered’.²⁸⁸ And, according to the group, if an individual was ‘captured in combat and with a weapon, he or she would not be categorized as a hostage’.²⁸⁹ ‘It seems to me’, the interviewee added, ‘that the international regulation does not grant the category of hostage to an individual who is captured with a weapon. But the enemy never acknowledged that our detainees were prisoners of war. Instead, they would call them “hostages”’.²⁹⁰ They would be held due to ‘political need’, as the goal was to exchange them for FARC-EP members who were in the hands of the state.²⁹¹ According to the interviewee, exchange of detainees actually took place on certain occasions, such as when they exchanged 500 governmental soldiers for a squad of 12 FARC-EP's members: ‘Why [the difference in numbers]? Because for the government, the soldiers were of little importance, so the difference between the number of people we gave [back to the government] and what we received [in return] was extremely important’.²⁹² Interestingly, as noted earlier in this case study, in *Beligerancia* the FARC-EP refers to possible

exchanges of ‘prisoners of war’ as seemingly envisaged in Article 44 of Additional Protocol I to the Geneva Conventions, which, according to the group, ‘does not differentiate between “legitimate combatants” and “illegitimate combatants”’.²⁹³

Later, the group nonetheless changed its practices. When explaining this change, the same former member pointed out:

Who were these people who developed the rules that allowed for such an exchange between prisoners? Who were they? They were those in the legislative branch – and this is because we started to detain people from the government, which made the government take notice. We noticed at that time that for the government, the soldiers – who were children of the peasants – were of little importance.²⁹⁴

It was thus explained that political figures such as Ingrid Betancourt and Clara Rojas were detained because ‘they were part of the institution [the government] and we needed to put pressure on in order for an exchange to take place, so our own comrades would be freed. We didn’t have any other choice’.²⁹⁵ A similar justification was given regarding the 12 provincial law-makers of the Valle del Cauca Department (Cali),²⁹⁶ most of whom ended up

²⁸⁷ Ibid. This was included in Art 7(k) of the FARC-EP's Statute. In addition, a former member of the FARC-EP's Secretariat mentioned that the conferences had a particular role in the development and further amendments of the FARC-EP's internal rules. This can be seen in the same Statute, which was adopted in 1978, modified in 1982 and updated in 1993 and 2007.

²⁸⁸ Interview with former commander of the FARC-EP, 4 July 2019.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ FARC-EP, *Beligerancia*, supra fn 34, p 13. It should be noted that Art 44 of AP I to the Geneva Conventions does not explicitly envisage the possibility for the parties to undertake an exchange of prisoners of war.

²⁹⁴ Interview with former commander of the FARC-EP, 4 July 2019. See also *Caso No. 01 Toma de rehenes y graves privaciones de la libertad cometidas por las FARC-EP*, supra fn 285, pp. 141–143.

²⁹⁵ Interview with former commander of the FARC-EP, 4 July 2019.

²⁹⁶ Geneva Call, *Administration of Justice by Armed Non-State Actors: Report from the 2017 Garance Talks*, 2018, p 1, https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issu

killed. According to one researcher, efforts were made by the group to detain ‘civilian individuals that function[ed] as “symbols” of the state and the government, such as ministers, mayors, governors, and parliamentarians, thus sending the signal that the state is also vulnerable’.²⁹⁷ In addition, these detentions gave the FARC-EP ‘publicity and immediate visibility nationally and internationally’.²⁹⁸

There were moments, however, in which no exchange proposals existed. The same former member acknowledged the practical difficulties of holding detainees, as each individual ‘needed at least 12 people’ to guard him/her.²⁹⁹ The FARC-EP did not have the facilities that the state had to keep people deprived of their liberty; added to this was the ‘constant mobility of the group’, which entailed that they had to take their detainees with them. For the group, therefore, ‘it was a very uncomfortable situation’. Yet the FARC-EP needed, according to him, to position itself

as a belligerent force under international law, because we had a uniform and a responsible command. We believe that we managed to position ourselves to that end, to the extent that, if we took prisoners, we were under the obligation to guarantee their lives.³⁰⁰

e02_Report_2018_web.pdf (last accessed 2 January 2021). For a description of the 12 provincial law-makers’ case, see *Caso No. 01 Toma de rehenes y graves privaciones de la libertad cometidas por las FARC-EP*, supra fn 285, pp 155–158.

²⁹⁷ Sjöberg, ‘Challengers Without Responsibility?’, supra fn 41, p 216.

²⁹⁸ P. Drouhaud, *FARC: Confessions d’un guérillero*, Choiseul, 2008, p 85, cited in *ibid*.

²⁹⁹ Interview with former commander of the FARC-EP, 4 July 2019.

³⁰⁰ *Ibid*.

³⁰¹ *Ibid*. Amnesty International has noted that ‘[h]ostage-taking, particularly of high-profile victims ... has also been used as a powerful tool in guerilla efforts to exchange these hostages for guerrilla prisoners held by the authorities’. Amnesty International, ‘*Leave Us In Peace*’, supra fn 13, p 36. In 2017, however, a former commander of the group

When asked about other categories of detainees, such as ordinary civilians from the communities they controlled, he said that they were not detained, as the goal was always to have a political impact: ‘taking someone off the street was not of interest to the state at all’,³⁰¹ therefore detaining them would not have led to an exchange of prisoners. In addition, he could not remember deprivations of liberty in order to prevent someone from participating in the conflict against them. The former commander added that FARC-EP ‘a relationship of respect with all the people in the areas where it operated, among other reasons, because [the group] came from within these communities, and everyone had parents, relatives, friends there’.³⁰² This is why they were not interested in depriving individuals coming from those communities of their liberty.

What did occur, a former member noted, ‘were some economic retentions’, but as a policy the goal was not to detain.³⁰³ Some of these detentions were based in the FARC-EP’s law 002 of 2000, which dealt with taxation.³⁰⁴ This law, which was publicly derogated by the Secretariat on 4th July 2016 in the context of the peace negotiations,³⁰⁵ noted that the group could collect taxes ‘for the peace’ from those natural or legal entities whose patrimony was superior to 1 million dollars. Those who did not meet this requirement, the law stated, ‘will be retained’, and their release ‘will depend on the payment

explained that they would also detain civilians when they were a danger to the community. Geneva Call, *Administration of Justice by Armed Non-State Actors*, supra fn 296, p 11.

³⁰² Interview with former commander of the FARC-EP, 4 July 2019.

³⁰³ *Ibid*.

³⁰⁴ FARC-EP, Ley 002: Sobre la tributación, <http://www.cedema.org/ver.php?id=4354> (last accessed 2 January 2021).

³⁰⁵ Art 3 of Law 002, which indeed envisaged detaining those who would not pay the tax, was in fact ‘derogated’ in 2012 by the FARC-EP with the goal of sending a message to the government in a context in which peace negotiations had already begun. See Aguilera Peña, *Guerrilla y población civil*, supra fn 16, pp 318–319.

that is determined'.³⁰⁶ Law 003 on 'Administrative Corruption', which was 'promulgated' at the same time, also envisaged that an individual could be detained by the FARC-EP if he or she 'unlawfully appropriate[d] public goods or money, or in the same way provide[d] them to third parties'.³⁰⁷ A former member of the group's Secretariat noted that these laws aimed at shaping the group's 'policy' of detention.³⁰⁸

Bearing these practices in mind, two recent developments in relation to the detention activities of the FARC-EP shall be noted. First, in September 2020 the former Secretariat of the group asked for 'public forgiveness from all our kidnapping victims and their families'. A few years after the end of the conflict, it acknowledged that that 'kidnapping was a very serious mistake which we can only regret'.³⁰⁹ The second relevant development in this field is a recently decided case by the Special Jurisdiction for Peace. In January 2021, this Tribunal found that some former leaders of the FARC-EP were responsible of the war crime of hostage taking and the crime against humanity of severe deprivation of liberty, among others.³¹⁰ Different types of deprivations of liberty are identified in the case, such as those of civilians in order to 'identify enemies' and collect information, those of public officials and other individuals who held a governmental function, detentions for civilians to undertake forced labour, and for the purposes of prisoners' exchange.

As regards as the treatment of those individuals deprived of their liberty, one

interviewee said that one problem they had was that the group was constantly moving because of the military operations they were facing from the government. Therefore, 'those people suffered the hardships' of that scenario, 'precisely because of those same operations'. He added that '[m]any times I had mentioned this, whatever happens to these people, it's the state's responsibility. This is because they were chasing us and they did not want to sit down and talk to us about [prisoners exchanges]. And the persecution was relentless, and people who were not used to that suffered a lot'.³¹¹ 'There was never cruel treatment', he said, adding that 'the former FARC-EP's members who were guarding them lived in the same situation or worse, as they would have to carry the medicine and food for the detainees'.³¹² According to a former commander, the group would give priority medical treatment to wounded detainees.³¹³ This was regardless of whether the individual was a fighter or not. Medical treatment was provided by FARC-EP members and not by humanitarian organizations, he claimed.³¹⁴

There are different public reports on how the FARC-EP dealt with deprivation of liberty. For instance, it has been mentioned that between 1970 and 2010, the group was responsible for 9,447 alleged kidnappings and for 3,325 confirmed cases.³¹⁵ In 2002, HRW even sent a letter to the FARC-EP demanding the release of 'kidnapped political figures',³¹⁶ after it had detained the above-mentioned law-makers from the state legislature building in Cali.³¹⁷ HRW has also documented cases of torture by the FARC-EP,

³⁰⁶ FARC-EP, Ley 002: Sobre la tributación, supra fn 304, Art 3.

³⁰⁷ FARC-EP, Ley 003: Sobre la corrupción administrativa, <http://www.cedema.org/ver.php?id=7956> (last accessed 2 January 2021).

³⁰⁸ 'Al menos 522 personas secuestradas por Farc murieron en cautiverio', *El Tiempo*, 23 September 2019, <https://www.eltiempo.com/justicia/jep-colombia/audiencia-en-la-jep-contra-los-exjefes-de-las-farc-por-secuestro-415408>.

³⁰⁹ FARC-EP, Declaración, 14 September 2020, <https://partidofarc.com.co/farc/2020/09/14/declaracion-4/> (last accessed 2 January 2021).

³¹⁰ *Caso No. 01. Toma de rehenes y graves privaciones de la libertad cometidas por las FARC-EP*, supra fn 285, pp 317–321.

³¹¹ Interview with former commander of the FARC-EP, 4 July 2019.

³¹² *Ibid.*

³¹³ Geneva Call, *Administration of Justice by Armed Non-State Actors*, supra fn 296, p 11.

³¹⁴ *Ibid.*

³¹⁵ Aguilera Peña, *Guerrilla y población civil*, supra fn 16, p 168.

³¹⁶ HRW, 'Colombia: Letter to Rebel Leader Demands Release of Kidnapped Political Figures', supra fn 13.

³¹⁷ HRW, 'Colombia: FARC Kidnappings Documented', 14 April 2002,

both with respect to enemy forces and their own members.³¹⁸ The same organization has also reported that the FARC-EP established a pattern of ‘abducting civilians suspected of supporting paramilitary groups, many of whom [were] later killed. Unlike abductions carried out for financial reasons, these abductions [were] often kept hidden’.³¹⁹ The FARC-EP, it is said, generally did not disclose the ‘victim’s fate or even acknowledge custody’.³²⁰ Relatives of those who had been seized by the group in these circumstances were therefore unable to obtain information about the fate or whereabouts of their loved ones.³²¹ It is currently estimated that between 350 and 735 people who were deprived of their liberty by this group never reappeared.³²²

2. FAIR TRIALS AND ADMINISTRATION OF JUSTICE

Under customary IHL, ‘[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees’.³²³ Article 6 of AP II provides further details on fair trial guarantees and the administration of justice.

Some FARC-EP rules address issues of fair trials and administration of justice. For instance, with respect to its own members, and after listing various breaches, its Statute establishes that a Revolutionary Council of War should be convened as follows:

- a. The General Assembly of Fighters [‘*Guerrillas*’] elects by vote the Council of War, composed of a president, a secretary, five Juries of Conscience, and a prosecutor. The defender is appointed by the defendant or defendants from among the combatant personnel attending

the Assembly. The verdict by the majority of the Jury condemns or acquits and it is [then] submitted to the consideration of the Assembly, which approves it, returns it to the Jury for its consideration and the Assembly takes the final decision. Defectors may be acquitted or convicted in absentia.

- b. Members of the Central Command or commanders who convene the Council of War may not act as defenders, since they are the body that formulates the charges against the accused. Nor may they serve on the board of directors or serve as juries of conscience. The first choice for a Council of War will be that of the Defender. The Defender will have access to the written report and reasonable time to discuss with the defendant.³²⁴

As a penalty, execution was an option in cases of extreme gravity. These include ‘treason, informing and other forms of voluntary collaboration with the enemy, murder of comrades in the ranks or the masses, desertion with weapons or money from the movement and other crimes according to their gravity’. The ruling could not be made until the respective leadership body had consulted the views of the Secretariat.³²⁵ According to the FARC-EP’s Statute, individuals sanctioned could appeal to the immediately superior body or even to the Central Command and the Secretariat when ‘he or she considers the penalty imposed to be

<https://www.hrw.org/news/2002/04/14/colombia-farc-kidnappings-documented> (last accessed 2 January 2021).

³¹⁸ HRW, ‘*You’ll Learn Not To Cry*’, supra fn 13, p 88.

³¹⁹ HRW, *Colombia: Beyond Negotiation*, supra fn 60, p 7.

³²⁰ Ibid.

³²¹ Ibid.

³²² ‘Los secuestrados que nunca volvieron’ *El Tiempo*, n.d., <https://www.eltiempo.com/justicia/investigacion/historias-de-secuestrados-en-colombia-que-desaparecieron-258768> (last accessed 2 January 2021).

³²³ Rule 100, ICRC CIHL Database, supra fn 94.

³²⁴ FARC-EP, Estatuto, Cap I, Arts 4(3)(a) and (b).

³²⁵ Ibid, Cap I, Art 4(4).

unfair’.³²⁶ If the superior body, it is indicated, ‘identifies malice in the appeal and finds the penalty to be fair, it can even sanction more severely’.³²⁷ The Statute also notes that when the penalty imposed is unfair or ‘exaggerated or, on the contrary, so light that it does not correspond to the seriousness of the fault or crime committed, it may be revoked by the Central Command or its Secretariat’.³²⁸ The conception of these rules was discussed with a former commander and member of the Secretariat. During an interview, he noted that at the beginning everything was rudimentary: ‘when the FARC-EP was a small organization, the disciplinary system did not exist. We were just the commanders who would identify “agents” or “infiltrators”, who would then be judged and shot ... There was an important element of arbitrariness in those procedures’.³²⁹ The Council of War appeared only at the Sixth National Guerrilla Conference (1978) in response to the needs to have a less arbitrary disciplinary system.³³⁰

The administration of justice for civilian matters was also part of the FARC-EP’s activities. It has been reported that the group issued several sets of rules to be implemented by various communities.³³¹ These were directed toward the inhabitants of the group-controlled territories, and are ‘said to be a guide for the good functioning of the community, regulating, *inter alia*, church activities and economic life’.³³² The FARC-EP’s commanders would interpret the norms, decide on the subject-matter and determine the appropriate resolution mechanism.³³³ For instance, it has been described that one way to solve everyday civilian life

matters was for the commander to set up a table in a public place, and people ‘would line up to present their problems’.³³⁴ These activities were a source of legitimation for the FARC-EP vis-à-vis the local communities under their control or influence. They could cover, a researcher explains,

the entire gamut of private law disputes, from neighbors fighting over property lines to abandoned wives seeking support from their ex-husbands, debt collection to injuries caused by animals. Often both sides to the disputes came ... The commander would listen to both sides and if possible hear from other witnesses as well ... In some cases, the decision was recorded in the official registry of decisions made by [the Junta de Acción Comunal], the local authority. The intimation in any case was that it would be not advisable to ignore or challenge a decision handed out by the FARC.³³⁵

For criminal matters, the FARC-EP would hold ‘popular trials’ for civilians accused of misdeeds and crimes, including ‘rape, spouse abuse, theft, or failing to pay a “war tax”’.³³⁶ For minor crimes, HRW affirms, the accused were warned twice, and if they did not rectify their behaviour, they could be summarily executed.³³⁷ According to an individual interviewed by HRW, the FARC-EP would call a community meeting in order to hear everyone’s testimony, and then the group would decide if the accused was guilty, even applying a ‘drastic punishment’ such as

³²⁶ Ibid, Cap I, Art 9.

³²⁷ Ibid.

³²⁸ Ibid, Cap I, Art 10.

³²⁹ Interview with former commander of the FARC-EP, 6 July 2019.

³³⁰ This information was found on the FARC-EP website, which is no longer available at the time of this case study’s publication. There, it was stated that the internal discipline was indeed established at the Sixth National Conference.

³³¹ R. Provost, ‘FARC Justice: Rebel Rule of Law’, 8 *UC Irvine Law Review* (2018) 247.

³³² Ibid.

³³³ Ibid, 248.

³³⁴ Ibid.

³³⁵ Ibid, 248–249.

³³⁶ ‘V. Guerrilla Violations of International Humanitarian Law’, in HRW, *War Without Quarter: Colombia and International Humanitarian Law*, 1998, https://www.hrw.org/legacy/reports98/colombia/Colom98-9-05.htm#P1341_318397 (last accessed 2 January 2021).

³³⁷ Ibid.

execution.³³⁸ Other punishments could include community work. Executing, as a penalty for these crimes, is addressed in the ELN/FARC-EP's the Rules of Conduct with the Masses, where it is said that:

[Leaders and combatants] should bear in mind that executions may only be carried out for very serious crimes committed by enemies of the people and with express authorization in each case of each organization's senior governing body. In all such cases, evidence must be examined and decisions taken collectively. The leadership must produce a written record setting out the evidence.³³⁹

Reports on how the group administered justice are numerous. With respect to the abovementioned popular trials, for instance, HRW found that they had executed someone without giving them a fair trial, as required by IHL. In a 1997 report, this NGO notes that the group rarely ever informed the accused of the charges, or the trial procedure that it intended to follow.³⁴⁰ Furthermore, during the trial the accused were not allowed to have a proper defence, and, in HRW's words, 'the accused [were] presumed guilty during the trial and ... often tried *in absentia*'.³⁴¹ Also, there were no appeals processes. Therefore, HRW argues, 'all killings carried out as a result of a so-called popular trials by the FARC [were] serious violations of the laws of war'.³⁴² This is why the same report calls upon the FARC-EP's General Secretariat to 'cease holding so-called popular trials, which lack minimal due process

guarantees'.³⁴³ HRW discussed the IHL standards 'on fair and impartial trial guarantees' with representatives of the group in 2000. At the time, they replied that these 'were not applicable to the armed conflict in Colombia and, in particular, to the conduct of the FARC-EP'. In the view of these commanders, 'these standards did not apply because the FARC-EP had not expressly agreed to them, they represented "elite interests," and they were not appropriate to the Colombian context'.³⁴⁴

A scholar who has extensively analysed this group's activities has affirmed that in its administration of justice, there was no presumption of innocence, no right to due process: 'it is a despotic, yet efficient justice'.³⁴⁵ In this system, according to this scholar, the FARC-EP 'committed all type of arbitrariness; based on only comments, rumours and unverified information, in several areas of the country there was a real witch hunt' in which community members would go to the group to accuse 'their neighbours' of collaborating with the police.³⁴⁶

J. THE SPECIAL PROTECTION OF CERTAIN OBJECTS, SUCH AS CULTURAL PROPERTY

Under customary IHL, each party to the conflict must respect cultural property. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by

³³⁸ Ibid.

³³⁹ ELN/FARC-EP, Rules of Conduct with the Masses, *supra* fn 77, Para 14.

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ HRW, *Colombia: Beyond Negotiation*, *supra* fn 60, p 4.

³⁴⁴ Ibid, pp 5-6.

³⁴⁵ A. Ávila, 'Así administran justicia las Farc en sus territorios', *Fundacion Paz y Reconciliacion* (Pares), 23 April

2016, <https://pares.com.co/2016/04/23/asi-administran-justicia-las-farc-en-sus-territorios/> (last accessed 2 January). In a recent study on administration of justice by ANSAs in Colombia, Aguilera Peña has also noted that the objectives of the groups were to deliberately counter state activities by offering 'a cheap and efficient service' that would take advantage of the difficulties that individuals had in accessing justice in many areas of Colombia. M. Aguilera Peña, *Contrapoder y justiciar guerrillera: Fragmentación política y orden insurgente en Colombia (1952-2003)*, IEPRI, 2014, p 124.

³⁴⁶ Ávila, 'Así administran justicia las Farc en sus territorios', *supra* fn 345.

military necessity.³⁴⁷ In addition, the use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity.³⁴⁸ All seizure or destruction of or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.³⁴⁹ The international legal framework also protects intangible heritage. The 2003 UNESCO Convention defines intangible cultural heritage as '[t]he practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage'. Although the obligations enshrined in this Convention are binding upon States, they can serve as guidelines for ANSAs willing to take safeguarding measures.

Different internal documents by the FARC-EP partially refer to this issue. In the Rules of Conduct with the Masses, for instance, it is noted that the ANSA's members 'should respect the political, philosophical, and religious ideas and attitudes of the population, and in particular the culture and autonomy of indigenous communities and other ethnic minorities'.³⁵⁰ According to this document, it is in fact a breach of the internal rules to conduct 'any activity aimed at preventing the believing population from practicing their religious worship'.³⁵¹ Similar rules had been included before the

adoption of these Rules in 2009. In Law 001 on Revolutionary Agrarian Reform, which the FARC-EP adopted during the Seventh National Guerrilla Conference (1982), it is stated that indigenous communities 'shall enjoy all the benefits of the present Law, which contributes to stabilizing the autonomous organization of the communities, respecting their councils, their culture, their own language, and their traditions'.³⁵² Similarly, one of the goals of the group, which was agreed upon after a meeting of the Central Command in 1984, was to fully respect 'indigenous cultures and customs'.³⁵³

In an interview, a former commander of the group noted that, as a matter of principle, the FARC-EP 'would defend the existence of ethnic religious beliefs' as this was included in the group's internal rules.³⁵⁴ He described a case in which the authorities of an indigenous community requested that the ANSA leave an area of importance, which was accepted without hesitation.³⁵⁵ Another former commander added that even when they would find an infiltrator who belonged to an indigenous community, the FARC-EP would return them to that community in order not to breach their customs and norms.³⁵⁶ He also recalled the following case, that did not include an 'infiltrator' but a regular member:

We did the same with another boy who had also joined the group. He was already a commander, but we returned him to his community. The argument presented by the community was that they needed him back, as he was the son of their *cacique* (chief) and when that *cacique* died, he would have to take over that position. And then we made an agreement with

³⁴⁷ Rule 38, ICRC CIHL Database, supra fn 94.

³⁴⁸ Rule 39, *ibid.*

³⁴⁹ Rule 40, *ibid.*

³⁵⁰ ELN/FARC-EP, Rules of Conduct with the Masses, supra fn 77, Art 2.

³⁵¹ FARC-EP, Estatuto, Art 3(o).

³⁵² FARC-EP, Ley 001: De reforma agraria revolucionaria, <http://cedema.org/ver.php?id=5627> (last accessed 2 January 2021), Art 7.

³⁵³ This information was found on the FARC-EP website, which is no longer available at the time of this case study's publication.

³⁵⁴ Interview with former commander of the FARC-EP, 4 July 2019.

³⁵⁵ *Ibid.*

³⁵⁶ Interview with former commander of the FARC-EP, 4 July 2019.

[the community] to not incorporate indigenous people into the guerrilla ranks in the region of Catatumbo.³⁵⁷

In 2017 it was reported that a FARC-EP commander had created a museum in the Cauca region, where around 3,000 objects were preserved. Among them were the pipes of the first aqueducts used by indigenous tribes, the sarcophagi for their funerals, the mill for the preparation of spices and a plaque dating from 1821 that records the passage of Simón Bolívar through these lands.³⁵⁸

Despite the existence of these rules and practices, it has been reported that the FARC-EP conducted attacks against certain indigenous communities and their members. In a 2015 report, for instance, OHCHR noted that this group's members killed two Nasa indigenous guards in the Cauca region.³⁵⁹ HRW had already documented, in 2005, attacks by the FARC-EP against this community with gas cylinder bombs.³⁶⁰ The group has also been accused of having attacked the Awá community in February 2009.³⁶¹ Later that same year, the FARC-EP publicly apologized for the killing of 8 members of such community, also stating that the group's principles 'demand respect for indigenous organisations, their worldview and culture, because the indigenous cause is the same as that of the FARC-EP'.³⁶² During the interviews, a member of the group stated that these incidents should be clearly investigated in order to 'define what really happened, as there were some dead indigenous people'. Nonetheless, he claimed that

it was never the goal to eradicate any indigenous people.³⁶³

6. CONCLUSIONS

The following conclusions can be extracted from this case study:

- Although the FARC-EP considered international law to be an 'elitist' legal regime, developed by states and only considering their own interests, the group modified its attitudes throughout the conflict, reflecting the rise and fall in its level of acceptance at specific moments. Two key moments in which the FARC-EP openly addressed IHL-related issues were identified during the interviews: i) when in discussions with the ICRC on the ground; and ii) when the FARC-EP attempted to be recognized as a 'belligerent movement', for which the international commission even prepared a written document (*Beligerancia*). From these scenarios, it is possible to conclude that international law, and in particular IHL, was a tool to be used when looking for political recognition before various constituencies. It can therefore be said that there was a deliberate decision by the group, which weighed the costs versus the benefits of declaring its commitment with this set of norms. The results varied depending on the goals of the FARC-EP at

³⁵⁷ Ibid.

³⁵⁸ 'El museo secreto de las FARC-EP', *Telesur*, 23 February 2017, <https://www.telesurtv.net/news/El-museo-secreto-de-las-FARC-EP-20170223-0034.html>.

³⁵⁹ HRC, Annual Report of the United Nations High Commissioner for Human Rights: Addendum: Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia, UN doc A/HRC/28/3/Add.3, 23 January 2015, §48.

³⁶⁰ HRW, 'Colombia: FARC mata con bombas de cilindros de gas', 15 April 2005, https://www.hrw.org/legacy/spanish/docs/2005/04/15/colomb10497_txt.htm (last accessed 2 January 2021).

³⁶¹ Amnesty International, 'Tercera masacre perpetrada contra la comunidad indígena awá en 2009', 27 August 2009,

<https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/tercera-masacre-perpetrada-contra-la-comunidad-indigena-awa-en-2009/> (last accessed 2 January 2021).

³⁶² FARC-EP, 'Comunicados de las FARC-EP a las comunidades indígenas Awá. Unipa, Canawari y Acipap y a las comunidades del Cauca', 14 April 2009, <http://www.indepaz.org.co/comunicados-de-las-farc-ep-a-las-comunidades-indigenas-awa-unipa-canawari-y-acipap-y-a-las-comunidades-indigenas-del-cauca/> (last accessed 2 January 2021).

³⁶³ Interview with former commander of the FARC-EP, 4 July 2019.

the time. This can be seen by the fact that IHL was only briefly dealt with publicly between 2002 and the discussions that led to the 2016 Peace Agreement.

- Two points can be noted regarding the normative responses that the FARC-EP adopted throughout the conflict. First, that these law-making and law-changing processes were institutionalized through the National Conferences, which were in charge of updating and ratifying FARC-EP legislation. This shows a high degree of organization and structure. In fact, certain 'laws' were adopted, such as those referred above on taxation and the Revolutionary Agrarian Reform. Second, when dealing with FARC-EP policies on specific issues, such as the deprivation of liberty and the prohibition of recruitment of children, the interviews demonstrate an explicit acknowledgment on the side of the hierarchy of the need to provide members with a normative framework to regulate their behaviour. The motivations behind this need for regulation – at least for those thematic areas – can be found in a change in the actual conflict dynamics, as at some point in time the FARC-EP had to start dealing with the situation of both, individuals deprived of their liberty and children.
- The analysis of the different rules shows that the FARC-EP tried to regulate and enforce certain issues more thoroughly than others. For instance, little was found in its internal regulations regarding the protection of schools, the prohibition of gender-based violence (other than rape) and the prohibition of forced displacement, despite these being clear humanitarian concerns in Colombia. In contrast, the administration of justice both with respect to its own members as well as the civilian population was a highly relevant topic for the FARC-EP. Similarly, child protection issues were dealt with through different public documents and internal regulations. This shows that for the group, certain humanitarian issues needed to be better

regulated, while others were not considered as important. An explanation to this variation can be found in the nature of certain rules, which may serve a clear organizational goal: the internal sanction regime, for instance, is necessary in terms of creating the group's cohesion, together with a clear command-and-control structure. This is different when dealing with those norms regulating the relation between the FARC-EP and the civilian population, for which a broader margin of action seems to have been left to the commanders, at least for certain thematic issues.

- A further point relates to how the FARC-EP's internal regulations should be seen when compared to international legal standards. In this regard, various rules were adopted when only common Article 3 to the 1949 Geneva Conventions was applicable. AP II, which contains a prohibition of using and recruiting children below the age of 15, only entered into force in Colombia in 1995; yet the FARC-EP had this prohibition in place since 1982. Rules and orders related to the conduct of hostilities were also adopted before they were identified as having a customary status.
- Despite the existence of these rules, reports by human rights organizations and UN bodies show clear problems with normative compliance. This can be identified in almost every rule assessed in this case study, even in those for which clear instructions had been drafted by the hierarchy and disseminated within the ranks. Two complementary explanations can be provided for this situation. First, the interaction of the FARC-EP with various entities, including other ANSAs, and the time at which the violations took place is certainly a point to consider. The group, like any actor in a conflict setting, was not an isolated entity. It interacted with local communities and leaders, international organizations, other groups and governmental and paramilitary forces. Based on the number of public reports and the violations there documented, it is evident that some of these

interactions had an effect on the way the FARC-EP fought in the conflict, both in terms of respect for and violation of the applicable legal regime. Indeed, it can be argued that communities and humanitarian actors had positively influenced the development of public commitments by the group. On the contrary, some of the military operations against this group by paramilitary ANSAs (and state's forces), which were also in violation of IHL, led the FARC-EP to also become more violent, increasingly disregarding the civilian population and committing a higher number of IHL breaches. Second, it has been said that the 'weaknesses of monitoring mechanisms' in the group may have undermined adherence to orders from the Central Command.³⁶⁴ Indeed, when considering that the group was located in different (and remote) areas in Colombia, it is not surprising that the command-and-control system would fail.

³⁶⁴ ICRC, *The Roots of Restraint in War*, supra fn 3, p 42.

7. ANNEXES

MAP OF COLOMBIA



Available online at <https://geology.com/world/colombia-satellite-image.shtml>

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